Modernizing the Energy Charter Treaty

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Facilitating Foreign Investment in the Renewable Energy Sector

Cees Verburg

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Modernizing the Energy Charter Treaty

Facilitating Foreign Investment in the Renewable Energy Sector

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by

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I. ACKNOWLEDGEMENTS

Writing a PhD dissertation can best be compared to the weather. When you start, with many years still to go and no deadlines in sight, the skies are clear and happy days are abound. However, when the years go by and the deadline comes closer, clouds gather. Clouds that increasingly adopt a dark(er) shade of color. There is, or at least so it feels, no escape from these increasingly dark clouds. You can go on vacation to a sunny destination, but as long as your dissertation does not write itself, all will be to little avail. Although this sounds much more gruesome than it really was – and the book that you are holding means that I have (almost) made it – I could not have finished this project without the help and support of many. Without attempting to provide an exhaustive overview of all those who helped, guided and inspired me along the way, a few people deserve some specific attention.

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Cees Verburg

The Hague, August 2019

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III. EXTENDED TABLE OF CONTENTS

IV. LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
CfD	Contracts for Difference
CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DSO	Distribution System Operator
ECT	Energy Charter Treaty
EEC	European Energy Charter
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIT	Feed-in-Tariff
FPI	Foreign Portfolio Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GDP	Gross Domestic Product
GVC	Global Value Chain
ICJ	International Court of Justice

ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
IEA	International Energy Agency
IIA	International Investment Agreement
ILC	International Law Commission
IMF	International Monetary Fund
IPA	Investment Promotion Agency
IRENA	International Renewable Energy Agency
ISDS	Investor-State Dispute Settlement
IUSCT	Iran-United States Claims Tribunal
LCIA	London Court of International Arbitration
LCOE	Levelized Cost of Electricity
LCR	Local Content Requirement
MCPS	Most Constant Protection and Security
MFN	Most Favored Nation
MW	Megawatt
NAFTA	North American Free Trade Agreement
NT	National Treatment

OECD	Organization for Economic Cooperation and Development
OEM	Original Equipment Manufacturer
PPA	Power Purchasing Agreement
PV	Photovoltaic
RAIPRE	Administrative Register of Production Facilities under the Special Regime
RES	Renewable Energy Sources
SCC	Stockholm Chamber of Commerce
SOE	State Owned Enterprise
TFEU	Treaty on the Functioning of the European Union
TiSA	Trade in Servcies Agreement
TNC	Transnational Corporation
TRIM	Trade-Related Investment Measure
UK	United Kingdom of Great Britain and Northern Ireland
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties

WTO	World Trade Organization
WTO TRIMS	WTO Agreement on Trade Related Investment Measures

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BA 32, Basic Agreement, 18 January 1993.

North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994).

Agreement Between the Government of the People's Republic of China and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments (China-Argentina) (adopted 05/11/1992, entered into force 01/08/1994).

Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria (Netherlands-Nigeria) (adopted 02/11/1992, entered into force 01/02/1994).

Treaty Between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment (United States-Bulgaria) (adopted 23/09/1992, entered into force 02/06/1994).

Agreement Between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments (Netherlands-Poland) (adopted 07/09/1992, entered into force 01/02/1994).

United Nations Framework Conference on Climate Change (adopted 04/06/1992, entered into force 21/03/1994).

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UK Model BIT, 1991.

Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (Argentina-United States of America) (adopted 14/11/1991, entered into force 20/10/1994).

Draft Basic Agreement, 31 October 1991. Available at: <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/3_-_BA_4__31.10.91_.pdf>

Accord Entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur L'Encouragement et la Protection Réciproques des Investissements (France-Argentina) (adopted 03/07/1991, entered into force 03/03/1993).

Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech Republic (Netherlands-Czech Republic) (adopted 29/04/1991, entered into force 01/10/1992).

Treaty Between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments (Germany-Argentina) (adopted 09/04/1991, entered into force 08/11/1993).

Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech Republic and Slovak Federal Republic for the Promotion and Protection of Investments (United Kingdom-Czech Republic) (adopted 11/07/1990, entered into force 26/10/1992).

Agreement Between the Government of Canada and the Government of the Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (Canada-Soviet Union) (adopted 20/11/1989, entered into force 27/06/1991).

Federal Republic of Germany and Union of Soviet Socialist Republics Agreement Concerning the Promotion and Reciprocal Protection of Investments (Germany-Soviet Union) (adopted 13/06/1989, entered into force 05/08/1991).

Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (Switzerland-Uruguay) (adopted 07/10/1988, entered into force 22/04/1991).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (United Kingdom-Bolivia) (adopted 24/05/1988, entered into force 16/02/1990).

Agreement Between the Government of the People's Republic of China and the Government of the State of Kuwait for the Promotion and Protection of Investments (China-Kuwait) (adopted 23/11/1985, entered into force 24/12/1986).

Netherlands Model BIT, 1979.

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UNCITRAL Arbitration Rules, 1976.

Permanent Sovereignty over Natural Resources, UNGA Res 3171 (XXVII) (17 December 1973).

Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/1980).

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18/03/1965, entered into force 14/10/1966).

Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962).

Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Germany-Pakistan) (adopted 25/11/1959, entered into force 28/04/1962).

Treaty of Friendship, Commerce and Navigation (Nicaragua-United States) (adopted 21/01/1956, entered into force 24/05/1958).

General Agreement on Tariffs and Trade (adopted 30/10/1947, entered into force 01/01/1948).

Treaty of Amity, Commerce and Navigation between His Britannick Majesty and The United States of America (United States of America-United Kingdom) (adopted 19/11/1794, entered into force 29/2/1796).

VII. TABLE OF EU AND DOMESTIC LEGISLATION

Bulgaria

Energy from Renewable Sources Act (2011).

Canada

Independent Electricity System Operator (former Ontario Power Authority), Feed-in Tariff Contract (FIT Contract), Version 5.0, 2016.

Ontario Power Authority, 'Feed-in Tariff Program, FIT Rules Version 2.1' (December 2012)

EU

Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the Internal Market for Electricity (Recast) [2019] OJ L 158/54.

Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.

Proposal for a Regulation of the European Parliament and of the Council on the Internal Market for Electricity (recast), COM(2016) 861 final/2.

Directive (EU) 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L140/16.

Spain

Ministerial Order IET/1045/2014, Boletin Oficial del Estado, nr. 150, 2014. P. 46430.

Royal Decree 413/2014, Boletin Oficial del Estado, nr. 140, 2014. P. 43876.

Royal Decree Law 9/2013, Boletin Oficial del Estado, nr. 167, 2013. P. 52106.

Law 15/2012, Boletin Oficial del Estado, nr. 312, 2012. P. 88081.

Royal Decree Law 14/2010, Boletin Oficial del Estado, nr. 312, 2010. P. 106386.

Royal Decree 1565/2010, Boletin Oficial del Estado, nr. 283, 2010. P. 97428.

Royal Decree 661/2007, Legislation Development of the Spanish Electric Power Act, Volume 11, 2009.

United Kingdom

FiT Contract for Difference Standard Terms and Conditions, 2015. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492815/CfD_-_Standard_Conditions_-_26_October_2015.pdf> accessed on 18/11/2016.

United States

Merchant Marine Act of 1920, Public Law No. 66-261, 41 Stat. 988.

CHAPTER 1.

Introduction and Research Design

1. INTRODUCTION AND RESEARCH DESIGN

The Energy Charter Treaty (ECT) is a multilateral trade and investment agreement that establishes 'a legal framework in order to promote long-term cooperation in the energy field.'[1] Concluded in the geopolitically turbulent early 1990's by primarily European and Central Asian States, the energy sector proved to be a sector where a win-win situation could be created between the contracting parties. By establishing an international legal framework that would govern amongst others investment, trade, and transit in the energy sector, the treaty could contribute to the realization of various policy objectives of the different parties involved.[2] Foreign Direct Investment (FDI) from capital exporting States in the West could contribute to the development of the energy sectors in the East where natural resources were abundant but a lack of capital and technology prevented their exploitation.[3] This, in turn, could contribute to the general economic development of former Communist States for whom FDI constituted a means to revive their economies.[4] Furthermore, since the ECT would also provide for rules on international trade and transit, these energy resources could subsequently make their way to European markets where imports from the East could enhance the security of energy supply in a time when the Middle East, an important source of oil for Western Europe, was in turmoil.[5]

Although the emphasis of the ECT was primarily on conventional energy sources, such as oil, gas, nuclear, and coal, the treaty demonstrates awareness for environmental considerations and Renewable Energy Sources (RES).[6] In doing

1. Article 2, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
2. Rafael Leal-Arcas, 'Introduction' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 1-2.
3. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 138-139. Kaj Hober, 'The Energy Charter Treaty – An Overview' [2007] 8(3) Journal of World Investment & Trade 323. P. 324.
4. Rafael Leal-Arcas, 'Introduction' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 2.
5. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 138-139. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015). P. 114. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 241-242. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). Pp. 106-107.
6. See for example: Article 19, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998). Understanding 2, Final Act of the European Energy Charter

so, it has been said that the treaty 'has broken new ground by coupling its trade and investment provisions with emphasis on the importance of environmental protection in all aspects of the energy industry.'[7]

In comparison to 25 years ago, climate change – and the measures required to mitigate its consequences – are currently higher on the political agenda than ever before. In the 2015 Paris Agreement, an agreement that was adopted under the United Nations Framework Conference on Climate Change (UNFCCC) – a framework convention that itself is recalled in the preamble of the ECT – the international community recognized the 'urgent threat of climate change' and acknowledged that it is a 'common concern of humankind.'[8] Therefore, the agreement aims at 'holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change'.[9]

The energy sector (can) play(s) a crucial role in mitigating climate change and meeting the target of the Paris Agreement.[10] On the one hand, it is traditionally a carbon intensive sector while, on the other hand, RES may be able to provide for low-carbon substitutes.[11] In addition, the stimulation of RES may also create jobs since RES are more labour intensive than conventional energy sources and States that rely on energy imports may enhance their security of supply by reducing their dependency on foreign suppliers.[12] Primarily due to incentives created by States, investments in RES have increased significantly over the last few decades to the extent that they make up a substantial proportion of

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Conference.

7. Clare Shine, 'Environmental Protection under the Energy Charter Treaty' in Thomas Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 545. Thomas Wälde & Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' [2001] 51 International & Comparative Law Quarterly 811. P. 817.
8. Preamble, Paris Agreement (adopted 12/12/2015, entered into force 04/11/2016). Antonio Morelli, 'Preamble' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 12.
9. Article 2(1)(a), Paris Agreement (adopted 12/12/2015, entered into force 04/11/2016).
10. Sebastian Heselhaus, 'Energy Transition Law and Economics' in Klaus Mathis *et al* (eds.), *Energy Law and Economics* (Springer 2018). Pp. 19-20.
11. Timothy F. Braun & Lisa M. Glidden, *Understanding Energy and Energy Policy* (Zed Book Ltd 2014). P. 12.
12. European Commission, 'European Energy Security Strategy' COM(2014) 330 final. Pp. 12-13. Hugo Lucas & Rabia Ferroukhi, 'Renewable Energy Jobs: Status, Prospects & Policies' (IRENA Working Paper 2011). P. 4.

total global energy investments.[13] Also, RES are increasingly becoming price competitive in comparison to conventional energy sources.[14] In light of these considerations, amongst others, it has been said that an 'energy transition' is currently underway.[15]

Nevertheless, very significant challenges remain. To make low carbon energy supply meet the world's energy demand in the year 2050, the International Energy Agency (IEA) estimates that global energy investments of USD 3.5 tln are needed on an annual basis until 2050.[16] As the main source of investment, the private sector will (have to) play an important role in the energy transition.[17] In 2016, it accounted for 90 percent of the RES investments.[18] Given the fact that global energy investments have amounted to approximately USD 1.8 tln over the last few years, just over 50 percent of the required amount, it is clear that investments will have to be ramped up considerably to meet the policy objectives of keeping global warming within the limits specified by the Paris Agreement while also ensuring that the world's energy demand is met.[19]

In order to increase the amount of investment, conducive policy instruments will have to be adopted at all political levels: sub-national, national, and international. However, since the economic interests in the RES sector increase as the sector itself grows, it sometimes seems that States are also viewing the RES sector as an interesting emerging economic pie of which they all want their share.[20] By adopting measures that constitute barriers to trade and investment, industrial policy objectives – *i.e.* those aimed at encouraging domestic economic development – may hinder the realization of green policy objectives – *i.e.* those related to the development and employment of RES – because these measures may make RES less competitive.

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13. International Energy Agency, *World Energy Outlook 2018* (OECD/IEA 2018). P. 243. International Energy Agency, *World Energy Investment 2019* (OECD/IEA 2019). P. 9.
14. International Renewable Energy Agency, *Renewable Power Generation Costs in 2018* (IRENA 2019). P. 11.
15. Id. Sebastian Heselhaus, 'Energy Transition Law and Economics' in Klaus Mathis *et al* (eds.), *Energy Law and Economics* (Springer 2018). P. 20.
16. International Energy Agency, *Perspectives for the Energy Transition – Investment Needs for a Low Carbon Energy System* (IEA/IRENA 2017). P. 8.
17. IRENA and CPI, *Global Landscape of Renewable Energy Finance* (IRENA 2018). P. 8.
18. Id.
19. International Energy Agency, *World Energy Investment 2019* (OECD/IEA 2019). P. 11.
20. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 39.

This dissertation will examine the role that one legal instrument at the international level plays in the current energy transition, namely the ECT. The main focus will be on the role that the treaty can play as an International Investment Agreement (IIA). The purpose of IIA's is to encourage flows of FDI between the contracting parties. As such they could, in theory, encourage flows of FDI that are necessary to implement the energy transition by addressing barriers to FDI – including those adopted in the pursuit of industrial policy objectives – and mitigate perceived investment risks by strengthening the rule of law in the energy sector.[21] FDI plays an increasingly important role in the RES sector and may be of particular relevance for countries that lack domestic financial resources to finance their energy transition.[22]

Since its conclusion nearly 25 years ago, the ECT has already played a notable role in international energy affairs, specifically in the context of investor-State relations.[23] With more than 120 known disputes between States and foreign investors it has become one of the most promiment IIA's in existence as it is the most often invoked treaty with nearly twice as many cases as the second most often invoked IIA, the North American Free Trade Agreement (NAFTA).[24] What is also notable is the fact that the treaty, in particular during the last decade, has primarily been relied upon in West-West relations rather than the anticipated East-West relations and not in the context of hydrocarbons, but primarily in the RES sector.[25]

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21. Rafael Leal-Arcas, 'Introduction' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 1.
22. Makane M. Mbengue & Deepak Raju, 'Energy, Environment and Foreign Investment' in Eric de Brabandere *et al* (eds.), *Foreign Investment in the Energy Sector – Balancing Private and Public Interests* (Brill 2014). P. 173.
23. Eric de Brabandere, 'The Settlement of Investment Disputes in the Energy Sector' in Eric de Brabandere *et al* (eds.), *Foreign Investment in the Energy Sector – Balancing Private and Public Interests* (Brill 2014). P. 134.
24. See UNCTAD Investment Policy Hub: <https://investmentpolicy.unctad.org/investment-dispute-settlement>. Note that the NAFTA has recently been 'renegotiated', which resulted in the United States-Mexico-Canada Agreement. This agreement was concluded on 30/11/2018 but has not yet entered into force. For its implications on the investment chapter of NAFTA, see: Robert Landicho & Andrea Cohen, 'What's in a Name Change? For Investment Claims Under the New USMCA Instead of NAFTA, (Nearly) Everything' (Kluwer Arbitration Blog 2018). <http://arbitrationblog.kluwerarbitration.com/2018/10/05/whats-in-a-name-change-for-investment-claims-under-the-new-usmca-instead-of-nafta-nearly-everything/> accessed on 14/06/2019.
25. Cees Verburg, 'Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement' [2019] 20(2-3) Journal of World Investment and Trade 425. P. 434. Stephanie Grace Hawes, 'The Energy Charter Treaty: New Energy, New Era' (Thomson Reuters, Arbitration Blog 2016). <http://arbitrationblog.practicallaw.

Not only the energy sector and the context in which the ECT is invoked are subject to change, the treaty itself may soon be too. Currently, the Energy Charter Conference, which is the conference of ECT contracting parties, is in the process of modernizing the treaty.[26] This was started by the adoption of the International Energy Charter in 2015.[27] The International Energy Charter is a legally non-binding declaration of 'political intention' and has been signed by a number of countries that well exceeds the current constituency of the ECT.[28] In 2017, the Energy Charter Conference held that the second step of the modernization process 'is to consider the potential need and/or usefulness of updating, clarifying or modernising' the text of the ECT itself.[29] To that end, the Conference compiled a list of 'approved topics for modernization' in late 2018.[30] This list consists primarily of topics related to the investment chapter of the ECT, which will also be the main focus of this dissertation.[31]

1.1. RESEARCH OBJECTIVE AND CONTRIBUTION

The objective of this dissertation is to analyze what changes could be made to Part III of the ECT – concerning investment promotion and protection – to

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com/the-energy-charter-treaty-new-energy-new-era/> accessed on 06/06/2019.

26. Dylan Geraets & Leonie Reins, 'Article 1 – Definitions' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 19.
27. Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty (CCDEC 2017 23 STR, 28 November 2017). P. 2.
28. Energy Charter Secretariat, 'The International Energy Charter' (23 June 2016) <https://energycharter.org/process/international-energy-charter-2015/overview/> accessed on 06/06/2019.
29. Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty (CCDEC 2017 23 STR, 28 November 2017). P. 2.
30. Energy Charter Secretariat, 'Approved Topics for the Modernisation of the Energy Charter Treaty' (29 November 2018) <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> accessed on 06/06/2019.
31. The list of topics includes: Pre-investment; Definition of 'charter'; Definition of 'economic activity in the energy sector'; Definition of investment; Definition of investor; Right to regulate; Definition of Fair and Equitable Treatment (FET); MFN Clause; Clarification of 'most constant protection and security'; Definition of indirect expropriation; Compensation for losses; Umbrella clause; Denial of benefits; Transfers related to investments; Frivolous claims; Transparency; Security for costs; Valuation of damages; Third party funding; Sustainable development and corporate social responsibility; Definition of 'transit'; Access to infrastructure (including denial of access and available capacities); Definition and principles of tariff setting; REIO; Obsolete provisions.

more effectively facilitate RES investments.[32] As such, this research will have a practically oriented objective: its purpose is to give recommendations for legal changes to the ECT that could be implemented and applied with the purpose of improving the existing legal framework in order to facilitate investments in the RES sector. This dissertation thus concerns the operation of the law, that is international investment law – and the ECT in particular – in a specific context, namely the RES sector.

As a part of this research, the existing legal framework of the ECT will be analyzed to examine what the current framework provides for. As such, the research may be of interest to those who, in the course of their work, deal with the ECT. It has to be noted, however, that the primary objective of this research is not to establish the exact content of existing norms of the ECT, *i.e.* what is the law?, but rather to describe what changes could be made to the treaty to facilitate RES investments more effectively, *i.e.* what should the law be? Therefore, this exercise will be one in deductive logic.[33]

The main contribution that this dissertation strives to make concerns the interrelatedness of investment and trade in the RES sector and, therefore, it will emphasize that a legal framework which governs investments in RES should reflect this. At the start of this research project in 2015 the focus was initially exclusively on investment protection under the ECT and its application to RES investment disputes. At the time, this was chosen in light of the significant number of pending ECT disputes concerning RES at the time. However, as this research progressed the present author became convinced that more ambitious rules are required in order to effectively facilitate RES investments. Ever since the failure of the International Trade Organization in the late 1940's, the public international law rules governing trade and investment have seemingly developed into two almost separate fields of 'international law.'[34] In reality, however, investment and trade are very much interrelated: much of the world's trade in goods is for example intra-firm and this can only exist when firms invest abroad.[35] To a significant

32. Part III, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
33. Paul Chynoweth, 'Legal Research' in L. Ruddock *et al* (eds.), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008). P. 32.
34. Mark Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Zachary Douglas *et al* (eds.), *The Foundations of International Investment Law – Bridging Theory into Practice* (Oxford University Press 2014). P. 172.
35. Rainer Lanz & Sébastien Miroudot, 'Intra-Firm Trade: Patterns, Determinants and Policy Implications', OECD Trade Policy Papers No. 114 (OECD Publishing 2011).

extent, business practice in the RES sector is very much the same. Therefore, it is argued in this dissertation that in order to facilitate RES investments most effectively, a governing legal framework should consider the entire value chain of RES, including that of generation equipment and project development, since increased efficiency along any segment of the value chain can enhance the competitiveness of RES. This requires one to think beyond the traditional 'silos' of international investment law and international trade law; it entails that a more holistic approach should be adopted.

1.2. RESEARCH QUESTION

The main question that this research will answer is:

> "What changes to the legal framework of the ECT, regarding investment promotion and protection, have to be made to facilitate investments in renewable energy sources?"

This question makes clear that my analysis is, in principle, limited in scope to the provisions of Part III of the ECT which concerns investment promotion and protection. Nevertheless, certain provisions that can be found outside Part III may still be relevant. Think of the definitions of 'investment' and 'investor' which determine the scope of the provisions of Part III of the treaty but that are found in Art. 1 ECT. Also, Arts. 21 and 24 ECT contain a carve out and exceptions that, subject to certain conditions, preclude the application of provisions of Part III of the treaty. For the sake of completeness, these provisions will also be taken into account. Furthermore, this dissertation will be limited to the substantive norms as laid down in Part III of the ECT. Therefore, procedural rules, for example relating to Investor-State Dispute Settlement (ISDS), which is addressed in Part V of the treaty, will not be discussed.

To further specify the purpose of the research question, I will briefly elaborate on what I consider a feasible change to the ECT that facilitates RES investment. In essence, I will primarily be looking for changes that can increase the competitiveness of RES, for example by reducing the levelized cost of electricity (LCOE).[36] The presumption is, based on economic theories, that once RES

36. The LCOE is the price of electricity produced by generation facilities considering the entire lifetime of a facility, including costs related to construction, operation, and maintenance. Also, the costs of fuel, which in the case of most forms of RES are non-existent, are taken

becomes price competitive with conventional energy sources, the market will favor investments in RES over conventional energy sources.[37] Economic theory will be relied upon to determine what measures would enhance economic efficiency, the costs of capital and/or reduce transaction costs.

A successful energy transition to low carbon energy sources requires significant investments in not only RES generation facilities, but also in network infrastructure, storage, and demand/supply technology. In this research, I will primarily limit myself to investments related to the production of RES which most often generate a form of RES into electricity.[38] This delimitation ensures that the specific characteristics of the RES industry can be considered.

1.2.1. Sub-Questions

To answer the main research question, the following sub-questions will be adressed:

1) On the basis of economic theory, what factors are to be taken into account for the investment chapter of the ECT to enhance economic efficiency of RES investments and reduce investment risks?

2) How does the current RES sector operate: who are the investors, how is the sector organized, and to what extend are investments cross-border? What are existing barriers to investment and trade in the RES sector and how do they affect investors/investments?

3) Under what circumstances was the ECT negotiated and concluded, what are the main 'pillars' of the treaty, and to what extent do RES fall under the scope of the existing treaty?

4) What does the current legal framework of the ECT concerning investment promotion and protection provide for?

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into account.

37. Hubert D. Henderson, *Supply and Demand* (University of Chicago Press 1958). Chapter II. Marcia Lusted, *Supply and Demand* (Rosen Publishing Group 2018). Fred E. Foldvary, *The Foundations of Economic Theory* (Business Expert Press 2015). Pp. 55-63. Theo S. Eicher, John H. Mutti & Michelle H. Turnovsky, *International Economics* (Routledge 2009). Pp. 55-58.
38. It has to be noted that there are also renewable gasses, such as biogas.

5) In light of the considerations identified and after answering the first and second sub-questions, what are the shortcomings in the existing legal framework of the ECT?

6) What changes could be made to the legal framework of the ECT, concerning investment protection, to facilitate RES investments?

7) What changes could be made to the legal framework of the ECT, concerning investment promotion, to facilitate RES investments?

8) How can the identified changes be implemented by the ECT contracting parties?

The first sub-question, which will be answered in chapter 2, seeks to determine – on the basis of economic theories – what considerations should be reflected in the legal framework of the ECT if the purpose of that framework is to facilitate RES investments. This chapter will provide the theoretical background against which this dissertation will be set.

The second sub-question, which will be addressed in chapter 3, aims at providing a practical overview of the (renewable) energy sector and the entities active in that sector. Also, frequent barriers to investment and trade in that sector will be discussed. By making linkages to the previously discussed economic theories, these questions will try to link economic theory to practice and briefly outline how this may affect investors.

By answering the third sub-question, which will be discussed in chapter 4, the reader will obtain the historic background surrounding the conclusion of the ECT and the main pillars of the treaty: namely, trade, transit, and investment. Most importantly, this question will address the scope of the ECT and provide clarity regarding the applicability of the treaty to RES investments and investors.

The fourth sub-question, which will be spread out over chapters 5-7, will identify what the existing legal framework of the ECT provides for. In order to make meaningful suggestions as to an improved legal framework, this is a necessary preliminary question.

The fifth sub-question will answer what the shortcomings are in the existing legal framework of the ECT. This answer will be given in light of the economic and practical considerations laid down in chapters 2 and 3.

The sixth sub-question will focus on the rules on investment protection of the ECT and identify changes that could be made to it that may facilitate investments in RES. In a similar vein, the seventh sub-question will focus on the rules concerning investment promotion and identify potential changes that could be made in order to facilitate RES investments.

The final sub-question will address the 'legal tools' that are available to the ECT contracting parties to implement the identified changes that should facilitate RES investments.

1.3. RESEARCH DESIGN

This section will explain the research design chosen to answer the research question and sub-questions.

1.3.2. Theoretical Assessment Framework

Although this dissertation is legal in nature, I will primarily rely on economic theory to determine what changes should be made to the investment chapter of the ECT to facilitate RES investments. As such, the assessment framework will consist of economic theory. Hence, the primary purpose of this research is not to assess how the legal framework of the ECT interacts with other legal norms, rules, and/or principles, but to draw from economic theory to come up with recommendations to improve the current law.[39] Since 'legal research almost always incorporates information from other disciplines' this legal research will incorporate views from the economic discipline as these 'play an important role in shaping the law.'[40]

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39. Jan Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in Mark van Hoecke (ed.), *Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011). Pp. 116-121. Pauline Westerman & Mark Wissink, 'Rechtsgeleerdheid als Rechtswetenschap' [2008] 440 Nederlands Juristenblad 503. Pauline Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection on the Debate on Law' in Mark van Hoecke (ed.), *Methodologies of Legal Research – Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2011).
40. Irma J. Kroeze, 'Legal Research Methodology and the Dream of Interdisciplinarity' [2013] 16 Potchefstroom Electronic Law Journal 35. P. 52. Margaret Oppenheimer & Nicholas Mercuro, *Law and Economics - Alternative Economic Approaches to Legal and Regulatory*

1.3.3. Comparative Approach

While discussing the legal framework of the ECT and the case law developed thereunder, comparison will be made to other international agreements and relevant case law. The purpose of adopting this comparative approach is threefold. Firstly, by comparing the ECT to other relevant agreements – also in light of relevant case law – I will be able to position the treaty in the broader context of international economic law, identify differences, and the interaction between them.[41] Secondly, the identified differences can serve, on the one hand, as a source of inspiration for suggestions of changes that can enhance the competitiveness of RES while, on the other hand, it also allows me to make suggestions that are in line with contemporary investment policy practices.[42] This is in line with the decision of the Energy Charter Conference which 'expects' that the modernization process will use 'the current main trends' as 'a primary reference.'[43] Thirdly, treaty innovations outside the ECT context can have an

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Issues (Taylor and Francis 2004). Chapter 1. Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing 2002). P. 9.

41. Developments in ECT disputes may affect the drafting of subsequent IIA's. For example, many of the current ECT investor-State disputes concerning RES relate to regulatory changes to RES support schemes, sometimes by retroactively changing remuneration methodologies for subsidies. More recent IIA's, such as the Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the Bilateral Investment Agreement (BIT) between the European Union (EU) and Vietnam explicitly state that a decision not to issue, renew or maintain a subsidy does not amount to a violation of certain investment protection standards. Treaty innovations like these are relevant when making suggestion for a new investment chapter that should govern RES investments.
42. The importance to rely on other IIA's as a source of inspiration is twofold. Firstly, in its decision to modernize the ECT the Energy Charter Conference analyzed and considered 'current investment policy tendencies' in IIA's. Therefore, there is seemingly a desire amongst ECT contracting parties to align the content of the ECT with policy trends as incorporated in recent IIA's. In order for me to be able to come up with suggestions that would meet this requirement it is important to adopt a legal comparative approach in this dissertation. (See: Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty (CCDEC 2017 23 STR, 28 November 2017). P. 1) Also, even modern IIA's may adopt different approaches to comparable matters. For example, as will be seen, the current legal framework of the ECT concerning investment promotion merely contains best endeavors obligations that do little to effectively address discriminatory barriers to investment. Other IIA's, such as the North American Free Trade Agreement (NAFTA), the EU-Singapore FTA or CETA contain provisions that do promote and liberalize investment more effectively. Nevertheless, the various treaties may employ different drafting techniques that can influence the level of investment promotion, transparency, and predictability. This can be relevant when making suggestions for an improved legal framework: one could argue that higher levels of transparency can reduce transaction costs and consequently increase economic efficiency.
43. Energy Charter Secretariat, 'Approved Topics for the Modernisation of the Energy Charter Treaty' (29 November 2018) <https://energycharter.

influence on the interpretation and application of norms of the ECT, even if the ECT text does not incorporate certain innovations.[44] Admittedly, this latter point has inherent limitations.[45]

1.3.4. Interpreting the Law and Establishing its Content

When interpreting the ECT and relevant rules from other international agreements, I will interpret and establish the content of these rules on the basis of the rules

org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> accessed on 06/06/2019.

44. For example, where it concerns investment protection, contemporary IIA's – including IIA's concluded by ECT contracting parties – often contain more precise definitions and standards of treatment which can affect the scope of application and the level of investment protection offered by the treaty. In turn, these innovations may affect the interpretation and application of ECT norms. When reference to new treaty practice is made in this dissertation, it is important to keep in mind that although these new treaties do not affect the text and obligations from the ECT as such, they may have an influence on the interpretation and application of the treaty in practice. There are several examples where investment tribunals interpreted an IIA by reference to treaty innovations contained in more recent IIA's. For example, the tribunal in the *Philip Morris v. Uruguay* case that was interpreting and applying the Switzerland-Uruguay BIT made reference to the CETA and the EU-Singapore Free Trade Agreement (FTA) when interpreting the expropriation provision contained in the BIT. Contrary to the BIT, the CETA and EU-Singapore FTA contain annexes that more precisely describe the scope of indirect expropriation. This reference to IIA's concluded by the EU is notable given the fact that neither Switzerland nor Uruguay is legally involved in CETA or the EU-Singapore FTA. However, the tribunal came to the conclusion that these new treaty provisions reflected 'the position under general international law.' Consequently, this was a factor taken into account by the tribunal which eventually rejected the expropriation claim of Philip Morris. See: Annex 8-A, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Award, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, 2016. Paras. 290-307.

45. The impact of new treaty provisions on investment cases based on older IIA's, such as the ECT, may depend on the type of provision. For example, one could argue that an innovative provision which merely spells out the content of an already existing obligation in more detail – as happened in the *Philip Morris* case with regards to expropriation (see footnote above) – may have more influence than provisions that *de facto* create new carve outs, exceptions or alter the content of an obligation. In a case of the latter, an interpretation in line with the new provision would arguably amount to an amendment of the treaty. Arbitrators that are called upon to settle ECT disputes and subsequently interpret and apply the treaty in a manner that would *de facto* amount to an amendment of the treaty would arguably exceed their powers. With regards to this final point, see: *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, I.C.J. Reports 1966, p. 6. Para. 89. In the context of arbitration, see: Award, *Saudi Arabia v. Arabian American Oil Company (Aramco),* 23 August 1958, I.L.R. 27, 1963, p. 117. P. 148.

of treaty interpretation as enshrined in the Vienna Convention on the Law of Treaties (VCLT).[46] The fundamental rules of treaty interpretation are laid down in Arts. 31-32 VCLT and are considered to constitute customary international law.[47] Making use of the VCLT to interpret the ECT is in line with the practice of ECT tribunals.[48] This means that the treaty shall be interpreted 'in good faith in

46. Articles 31, 32 & 33, Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/1980).
47. Malcolm N. Shaw, *International Law* (Cambridge University Press 2008). P. 933. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43. Para. 160. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 174. Para. 94. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 48. Para. 83. *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 501. Para. 99. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 645. Para. 37. Award of the Arbitral Tribunal, *Iron Rhine Arbitration (Belgium/Netherlands)*, PCA Case No. 2003-23, 2005. Para. 45. Arbitral Award, *The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France)*, PCA Case No. 2000-02, 2004. Para. 59.
48. Arbitral Award, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. (126/2003), 2005. P. 23. Interim Award on Jurisdiction and Admissibility, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, 2009. Paras. 260-262. Final Award, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, 2014. Para. 1344. Interim Award on Jurisdiction and Admissibility, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2009. Paras. 260-262. Final Award, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2014. Para. 1344. Interim Award on Jurisdiction and Admissibility, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, 2009. Paras. 260-262. Final Award, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, 2014. Para. 1344. Decision on the Treaty Interpretation Issue, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, 2009. Paras. 157-165. Excerpts of Award, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, 2012. Paras. 333-336. Decision on Annulment, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, 2014. Para. 29. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 437. Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Para. 553. Decision on Jurisdiction, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2016. Para. 157. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 237. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 279. Decision on Termination Request and Intra-EU Objection, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, 2019. Para. 79. Decision on Jurisdiction, Liability and Quantum Principles, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 2019. Para. 580. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom*

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[49] Furthermore, subsequent practice in relation to the treaty or subsequent agreements shall be taken into account as context of the treaty in addition to its text.[50] This is quite relevant for the ECT, the context of which consists of a protocol, and numerous annexes, decisions, understandings, and statements.[51] On the basis of Art. 31(3)(c) VCLT 'any relevant rules of international law applicable in the relations between the paries' shall also be taken into account.[52] Under certain circumstances reference may also be made to the preparatory works on the basis of Art. 32 VCLT. Throughout this dissertation several references will be made to the negotiating history of the ECT. It has to be noted, however, that the archive of the Energy Charter Secretariat where the negotiating history is kept was rearranged when the

of Spain, ICSID Case No. ARB/14/1, 2018. Para. 197. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Paras. 206-207. Final Award, *Foresight Luxembourg Solar 1 S.Á.R.L., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, 2018. Paras. 201-204. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 453. Decision on the Intra-EU Jurisdictional Objection, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, 2019. Paras. 145-148. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 208. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 237. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 248. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 265. Decision on the Achmea Issue, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, 2018. Paras. 132, 153-154 & 169-184. Decision on the Intra-EU Jurisdictional Objection, *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, 2019. Para. 112. Decision on Jurisdiction, Liability and Partial Decision on Quantum, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, 2019. Para. 122. See also: Judgment, *Russian Federation v. Yukos Universal Ltd*, Rb The Hague (20 April 2016), Case No C/09/477162/HA ZA 15–2. Para 5.9.

49. Article 31(1), Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/1980). *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 4. P. 8.
50. Article 31(2), Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/1980).
51. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 13. Silke Goldberg & Krishna Kakkaiyadi, 'Energy Charter Treaty: An Overview' in Malgosia Fitzmaurice *et al* (eds.), *Multilateral Environmental Treaties* (Edward Elgar 2017). Pp. 440-441. Emmanuel Gaillard & Mark McNeill, 'The Energy Charter Treaty' in Katia Yannaca-Small (ed.), *Arbitration under International Investment Agreements – A Guide to the Key Issues* (Oxford University Press 2010). Pp. 30-40.
52. Article 31(3)(c), Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/1980).

Secretariat moved premises. In doing so it was rearranged from article-to-article basis to a chronological order. Consequently, the archives became less easily accessible and I have, therefore, not conducted an all-encompassing analysis of the preparatory works. Finally, Art. 33 VCLT contains rules for the interpretation of treaties that are authenticated in multiple languages. There are six authentic versions of the ECT: English, French, German, Italian, Russian, and Spanish.[53] For personal proficiency reasons I have made sole use of the English version. Furthermore, this was also the primary language used during the negotiations and most ECT cases are decided in English.

Throughout this dissertation extensive references will be made to case law developed under the ECT and other international agreements. The existing case law can provide guidance into the application of the relevant rules at hand even though it has to be noted that these decisions are not legally binding upon future adjudicators.[54]

1.3.5. Practical Research Methods Employed

The exact methods employed to conduct this research depend on the specific chapter and the content thereof.

Chapter 2 will outline the theoretic economic assessment framework. This will be done by reference to economic literature. The 3rd chapter will describe the (renewable) energy sector, which includes an analysis of the practical organization of the energy sector, and more specifically the electricity sector, the investors in the RES sector, and existing barriers to investment and trade. This will primarily be done by reference to reports of international organizations such as the IEA, the Organization for Economic Cooperation and Development (OECD), and other relevant national and international organizations. These reports give a factual overview of the RES sector, and the investment needs and barriers.

Chapters 4, 5, 6, and 7 contain an analysis of the existing legal framework of the ECT. The content of the ECT will be established in accordance with the rules on treaty interpretation as laid down above. Sources that will be taken into account include the text of the treaty and other relevant international agreements and

53. Article 50, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
54. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 565. Marc Bungenberg & Catharine Titi, 'Precedents in International Investment Law' in Marc Bungenberg *et al* (eds.), *International Investment Law – A Handbook* (C.H. Beck 2015). Pp. 1506-1511.

relevant case law of national and international courts and tribunals. In addition, academic literature, and, if relevant, the preparatory works of the ECT will also be considered.

After having examined the existing legal framework of the ECT and having identified various shortcomings in it, in particular in light of the theoretical and practical considerations that were laid down in the second and third chapter, chapter 8 will discuss potential improvement that can be made to the legal framework of the ECT. This chapter will attempt to link economic theory and the business practice of the RES sector, as described in the second and third chapters, and propose legal solutions that may facilitate investment.

Chapter 9, on the legal tools that are available to ECT contracting parties to implement changes, will be based on various sources, such as the text of the treaty, relevant procedural (arbitration) rules, relevant case law of tribunals as well as academic literature.

The final chapter of this dissertation contains the recommendations and conclusion.

1.4. DELINEATION AND LIMITATIONS

Like most research projects this dissertation has to be delineated which also means that it has inherent limitations.

Concerning the theoretical viewpoints, I will base my recommendations on economic theories because these underlie investment and trade agreements. This means that other important considerations are left out of the equation. For example, in international economics, comparative advantages are important in establishing where the factors of production can be employed most efficiently. However, the comparative advantage of some countries may primarily consist of low standards – concerning the environment, labor, and human rights – and cheap labor. In such a case, production may be economically efficient but not necessarily sustainable. Sustainability is not, however, part of the theoretical assessment framework since economic theories are the basis of international investment and trade agreements.

The main emphasis of this dissertation will be on the ECT. The ECT was chosen simply because the current research project was supposed to conduct research in relation to the ECT and disseminate this accordingly.[55] Since the ECT itself is a comprehensive legal framework that addresses multiple topics relevant for the energy sector, such as trade, transit, and investment, a further delineation within the ECT was required. Since the investment chapter is in practice highly relevant, in particular for RES investors, Part III of the treaty is the main subject of this dissertation. As said, certain provisions outside Part III may be relevant since they may affect the scope of Part III and are thus also addressed. This means that other parts of the ECT are not specifically subject of this dissertation, even though they may be highly relevant for the application of Part III. One can think of ISDS for example. Currently, ISDS is a controversial topic that will not be addressed because it is located in Part V of the treaty concerning dispute settlement.

Furthermore, since the modernization process of the ECT is conducted by the ECT contracting parties, one could also take international relations and political theories into account. This will likewise not be the case since the research design of this dissertation was adopted before the contours of the modernization process were clear. In addition, by putting the emphasis on economic theories against the factual background of the RES sector, the conclusions and recommendations of this dissertation might also be relevant beyond the ECT context.

This research was concluded on 1 June 2019. Any relevant developments after that date are not taken into account.

55. This dissertation has been written as part of a Green Deal research project, partially financed by the Dutch Energy Law Association (NeVER), Stibbe, and EBN.

CHAPTER 2.

Economic Theoretical Framework of Investment and Trade Agreements

2. ECONOMIC THEORETICAL FRAMEWORK OF INVESTMENT AND TRADE AGREEMENTS

It has been said that international investment law has been shaped by '[t]he interplay of various economic, political and historical factors.'[1] Since investing, or as the Oxford Dictionary defines it '[a] thing that is worth buying because it may be profitable or useful in the future' can be considered as an economic activity, this dissertation will draw from economic theory to analyze what changes could be made to the ECT to facilitate RES investments.

When discussing the legal regime governing investment and trade on an international level, one would expect that the content of investment and trade agreements represents an equilibrium of the diverging social and economic policies of the States involved in the negotiations of the agreement. At the very least, one would expect that the negotiation positions of the contracting parties to the ECT at the time of conclusion were in line with the larger social and economic policies of the States involved.[2] In that regard, the negotiation of the ECT was carried out by an interesting mix of countries with diverging economic backgrounds: in the former Communist States, Marxist economic (and legal) theory had prevailed until shortly before the negotiations of the ECT were initiated. In addition, under the reign of Ronald Reagan, neoliberal views had gained significant support in the United States (US), as well as in the United Kingdom (UK) of Margaret Thatcher. Continental European policies at the time were more aligned with liberal economic theory. As one might expect, the diverging views of these States were expressed in their respective investment treaty practice as will be explained below.

The aim of this chapter is to provide an economic background for international investment and trade agreements. Therefore, this chapter will begin with an analysis of diverging economic views on FDI, trade, and how these views influenced treaties. This will be done from a macro-economic and micro-economic viewpoint. Furthermore, the concept of transaction costs will be explained as well as the importance of the cost of capital. These two aspects can significantly affect the competitiveness of RES projects. If transaction costs

1. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2017). P. 9. Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing 2002). P. 9.
2. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 75.

are too high, economic exchanges may never take place while if the cost of capital is high, the electricity produced by such an investment might have a very high LCOE.

2.1. MACRO-ECONOMIC THEORIES: INVESTMENT AND TRADE

Macro-economics focusses on the way the economy performs as a whole and is often used by governments to develop economic policies. This can be contrasted with micro-economics, which focusses on the behavior of individuals or firms. Since IIA's are negotiated by States, but investments in the RES sector are most often eventually made by private investors, this chapter will briefly introduce both perspectives.

Long before IIA's were signed, the prevailing economic policy in Europe was known as mercantilism.[3] From the 16th through the 18th century, European States were concerned with accumulating wealth: export as much as possible in exchange for gold but import as little as possible to minimize the loss of gold.[4] If policy based on this theory prevails, exporting capital to other jurisdictions to invest abroad should be restricted, if not prohibited, since it is considered as a loss of wealth. In the late 18th and early 19th century, Adam Smith and David Ricardo would challenge the mercantilist theory by introducing the theory of economic liberalism. According to Smith free trade would allow for specialization, thus in the words of Smith: '[i]t is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. […] What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom.'[5] Ricardo would later develop the theory of comparative advantage: specialization would lead to the development of comparative advantages, which in turn will lead to economies of scale and maximize consumer welfare because resources are employed in the economically most efficient manner.[6] Thus, according to Smith and Ricardo,

3. Id. Stephen Husted & Michael Melvin, *International Economics* (Pearson 2007). P. 55.
4. Id.
5. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Wordsworth Editions 2012). P. 446.
6. David Ricardo, *On the Principles of Political Economy and Taxation* (John Murray 1821). Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2010). Pp. 3-4. Stephen Husted & Michael Melvin, *International Economics* (Pearson 2007). P. 60. Paul R. Krugman & Maurice Obstfeld, *International Economics: Theory and Policy* (Addison-Wesley 2000). P. 13.

States should be concerned with increasing their productivity in order to produce new wealth instead of trying to maximize their share of the existing wealth.[7]

On the basis of economic liberalism, the level of production in an economy is determined by a combination of factors: labor, capital, and natural resources.[8] Investments in either of these three can increase the total output of these factors and thereby increase productivity of an economy.[9] Investments can be financed domestically, for instance by savings, or from abroad.[10] In theory, FDI would than contribute to the host State in several manners.[11] Firstly, it increases the amount of capital in a given jurisdiction which means that domestic capital can be used for other purposes.[12] Secondly, FDI may be accompanied by the introduction of foreign technology, thereby increasing the level of technological development in a State.[13] This is an important consideration since RES technology is currently in the hands of companies from a relatively limited number of States while RES should, ideally, be employed in all developed and developing States alike.[14] Thirdly, labor may become more productive if training is provided for, thereby transferring skills to domestic employees.[15] Fourthly, the arrival of foreign companies may force the domestic industry to become more competitive.[16] Fifthly, domestic

7. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 75.
8. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. Pp. 478-479.
9. Id.
10. Id.
11. Leon E. Trakman & Nicol W. Ranieri, 'Foreign Direct Investment: An Overview' in Leon E. Trakman *et al* (eds.), *Regionalism in International Investment Law* (Oxford University Press 2013). Pp. 1-3.
12. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 48. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. Pp. 479-480. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 73. Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing 2002). P. 10.
13. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 48. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. Pp. 479-480.
14. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. Pp. 34-37.
15. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 48. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. Pp. 479-480.
16. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. P. 480.

infrastructure may be upgraded which also benefits the host State as a whole.[17] Finally, the arrival of foreign companies may lead to more integration in the world economy and thereby facilitate international trade by the host State in large.[18] In an increasingly integrated world economy consisting of Global Value Chains (GVC's), much of global trade is actually intra-firm trade.[19] Increased participation in world trade would, in turn, bestow host States the benefits as predicted by Smith and Ricardo: free trade leads to specialization, which leads to comparative advantages which allows for economies of scale and thereby the creation of efficiency that increases the general level of welfare.

According to economic liberals the home State of the investor also benefits from FDI. For instance, on the basis of the economic law of diminishing returns, 'each additional unit of capital brings a smaller return because of limits on the growth of the other factors of production.'[20] In addition, since much of the current world trade is actually intra-firm, the establishment of foreign subsidiaries may lead to increased exports of the home State as well.[21] Around the time of conclusion of the ECT the liberal economic view was a widely held view in continental Europe. Despite the fact that economic liberals considered it necessary that the market rather than the State determined the direction of investment flows, they did not favor completely unregulated markets.[22]

Going slightly further were the neoliberal views adhered to by policy makers in North-America and the UK in the 1980's and '90's.[23] More than the liberal economic view did neoliberals push for largely unregulated markets in the belief that this would allocate resources in the economically most efficient manner.[24]

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17. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 48.
18. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. P. 480.
19. For an explanation of GVC's, see section 3.3.1. Andreas Maurer & Christophe Degain, 'Globalization and Trade Flows: What You See is not What You Get!' (World Trade Organization, 2010). <https://www.wto.org/english/res_e/reser_e/ersd201012_e.pdf> accessed on 13/11/2018. Leon E. Trakman & Nicol W. Ranieri, 'Foreign Direct Investment: An Overview' in Leon E. Trakman *et al* (eds.), *Regionalism in International Investment Law* (Oxford University Press 2013). Pp. 12-13.
20. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. P. 481.
21. Id.
22. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 76.
23. David M. Kotz, 'Globalization and Neoliberalism' [2002] 14 Rethinking Marxism 64. P. 64.
24. Id.

On an international level, this meant that 'goods, services, and money (but not people)' should move freely across the globe.[25] This is evidenced in North-American and Japanese Bilateral Investment Treaties (BIT's), which are bilateral treaties concluded with the aim of promoting and protecting FDI.[26] In line with the US Model BIT for instance, the US-Bahrain BIT provides for so-called 'pre-establishment' rights.[27] In essence, pre-establishment rights extend the rules on National Treatment (NT) and Most Favored Nation (MFN) to the pre-establishment phase of an investment.[28] On the basis of such rules, a host State may no longer discriminate the foreign investor at the stages of establishment, acquisition, and expansion.[29] As Joubin-Bret points out, the host State, in essence, accepts 'a limit on its sovereignty to regulate foreign investment.'[30] Moreover, it also extends the object and purpose of the treaty to 'the general liberalization of markets for foreign investment.'[31] Nevertheless, this obligation may be subject to exceptions which may be laid down in the treaty itself.[32]

This approach can be contrasted with the traditional and quite consistent IIA practice of European countries.[33] For instance, the Netherlands-Georgia BIT states that:

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25. Id.
26. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). P. 26.
27. Articles 3 & 4, US Model BIT, 2012. Art. 2(1), Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001).
28. See also, section 5.7. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 13. Lee M. Kaplan & Jeremy K. Sharpe, 'United States' in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013). P. 776.
29. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 13.
30. Id. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). P. 26. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 338.
31. Lee M. Kaplan & Jeremy K. Sharpe, 'United States' in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press 2013). P. 776. Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009). P. 139.
32. Article 2(2), US Model BIT, 2012. Art. 2(1), Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001).
33. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection'

> "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of national of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments."[34]

Under these rules, the admission of FDI is within the discretion of the host State, thus there is no obligation to provide market access to foreign investors.[35] However, once a host State does admit foreign investors, these investors, once established, may be protected by the full range of investment protection standards as provided for by the treaty. This approach is also adopted by the ECT although the ECT does contain the ambition of a supplementary treaty that would contain pre-establishment rights.[36] This treaty would, however, never be concluded.[37]

It has to be noted that a shift in European IIA practice is currently taking place. Since the 2007 Treaty of Lisbon, the European Union (EU) has gained an exclusive competence over FDI in relation to the common commercial policy.[38] Since 2009, the EU has been active in negotiating and concluding Free Trade Agreements (FTA) that are aimed at liberalizing free trade and foreign investment. In that regard, it is not surprising that the EU-Canada Comprehensive and Economic Trade Agreement (CETA) and the EU-Vietnam FTA contain pre-establishment rights and rules on market access for foreign investors.[39]

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in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 11-12.

34. Article 2, Agreement on Encouragement and Reciprocal Protection of Investments between Georgia and the Kingdom of the Netherlands (Georgia-the Netherlands) (adopted 03/02/1998, entered into force 01/04/1999).
35. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 12.
36. Article 10(2)(3)(4), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
37. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 11-12.
38. Article 207, Treaty on the Function of the European Union (adopted 13/12/2007, entered into force 01/12/2009).
39. Articles 8.4, 8.6 & 8.7, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Articles 8.4, 8.5 and 8.6, EU-Vietnam Free Trade Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending). Maria Laura Marceddu, 'The Emerging Profile of the European IIAs' [2016] 13 Transnational Dispute Management 1. Pp. 13-14.

Although the liberal economic theory has had the most significant influence on the content of IIA's, it has not gone uncontested.[40] The dependency theory, for instance, emphasizes the detrimental effects of FDI and argued that FDI may make developing countries economically dependent on developed countries.[41] Several studies showed that although FDI might initially create an inflow of capital, related repatriations of profits were sometimes so significant that they exceeded the initial inflow.[42] Also, it has been argued that the transfer of technology which took place, primarily concerned outdated technology: when the end of the product cycle of a given technology was reached in the home State, it would be introduced in the developing country.[43] Furthermore, it was submitted that the interests of the foreign investor and the host State diverged. Whereas the host State required labor intensive industries – to create employment for its population – the foreign investor often made use of capital-intensive techniques which did not require a large labor force.[44] Additionally, if FDI and projects financed by FDI were not properly regulated, it could actually turn out to be destructive for the host State.[45] This might be the case, for example, when a foreign investor would be allowed to extract sub-soil minerals in a developing country which lacks adequate environmental regulations and the investment would lead to environmental degradation due to pollution.[46]

This theory was influential in Latin-America, Africa, and parts of Asia and starts with the presumption that most foreign investments are made by Transnational Corporations (TNC's) from developed countries in developing countries.[47] These

40. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2004). P. 54. Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing 2002). P. 12.
41. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 53. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 77. Leon E. Trakman & Nicola W. Ranieri, 'Foreign Direct Investment: An Overview' in Leon E. Trakman *et al* (eds.), *Regionalism in International Investment Law* (Oxford University Press 2013). Pp. 4 & 17. Leon E. Trakman & Nicola W. Ranieri, 'Foreign Direct Investment: A Historical Perspective' in Leon E. Trakman *et al* (eds.), *Regionalism in International Investment Law* (Oxford University Press 2013). P. 17. Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing 2002). Pp. 20-21. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). Pp. 5-7.
42. Sherif H. Seid, *Global Regulation of Foreign Direct Investment* (Ashgate Publishing 2002). P. 20.
43. Ibid. Pp. 12-13.
44. Id.
45. Id.
46. Id.
47. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge

subsidiaries would primarily serve the interests of the parent company and make the developing country economically dependent on the developed country.[48] Neo-Marxists regarded this as a form of neocolonialism.[49] Economic nationalists and neo-Marxists emphasized the importance of reducing dependency on developed countries by advocating economic self-sufficiency of the developing State.[50] In the most extreme cases this lead to the expropriation of investments owned by foreigners.[51]

The content of most IIA's, such as the ECT, is primarily influenced by liberal economic doctrines.[52] For instance, the European Energy Charter (EEC), whose objectives are incorporated into the ECT by reference, states that the signatories 'undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favorable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.'[53] In that regard, the shift with which Eastern-European and Central-Asian countries, that adhered to Communist ideology until the early '90's changed their views and accepted such a liberal document is noteworthy. Nevertheless, the fact that the ECT does not provide for pre-establishment rights has been named as a motive

University Press 2010). P. 53. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 77. Leon E. Trakman & Nicola W. Ranieri, 'Foreign Direct Investment: An Overview' in Leon E. Trakman *et al* (eds.), *Regionalism in International Investment Law* (Oxford University Press 2013). P. 4. Leon E. Trakman & Nicola W. Ranieri, 'Foreign Direct Investment: A Historical Perspective' in Leon E. Trakman *et al* (eds.), *Regionalism in International Investment Law* (Oxford University Press 2013). P. 17.

48. Id.
49. Michael P. Todaro, *Economic Development* (Longman 1994). Pp. 81-82. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). Pp. 76-77. This view of 'neo-Marxists' diverges from the original view of Marxists. They believed that FDI could be beneficial to developing countries.
50. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 53. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 77. Michael P. Todaro, *Economic Development* (Longman 1994). Pp. 491-492.
51. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). P. 77.
52. Ibid. P. 78.
53. Title I, European Energy Charter (adopted 17/12/1991). The objectives of the EEC are incorporated into the ECT by reference, see: Article 2, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).

for the US to decline signing the ECT.[54] Thus, although by all means a liberal document, the ECT was perhaps not liberal enough for the neoliberal US.

2.2. MICRO-ECONOMIC THEORIES

The section above elaborated on the motives of States to participate in IIA's from a macro-economic point of view. However, that does not explain why investors will invest abroad. Since investors are important beneficiaries of IIA's, especially of the investment protection standards and the procedural Investor-State Dispute Settlement (ISDS) mechanism, this section will explain why investors invest abroad from a micro-economic perspective. It has to be noted that the literature on FDI is voluminous and that many theories have been put forward. Since the aim of this section is not to provide a comprehensive overview of all FDI theories, but rather to provide an insight into the most basic deliberations of investors, some theories have been omitted. Reference will primarily be made to those theories that are most relevant for RES investors. Moreover, one should keep in mind that investment decisions are often based on multiple considerations, and not just one.

The most obvious reason for an investor to invest abroad is because of the expectation that a higher rate of return can be realized there.[55] However, this theory fails to explain why certain States simultaneously experience inward and outward flows of FDI.[56] Moreover, investors may have reasons to invest abroad that are not directly related to profits.[57] For instance, TNC's may invest abroad for logistical and operational reasons.[58] By establishing a foreign subsidiary, for example, TNC's may be able to avoid trade barriers such as import tariffs

54. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 11. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 143-152.
55. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 24. José S. Lizondo, *Foreign Direct Investment* (International Monetary Fund 1990). P. 2. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. P. 473. Jamuna P. Agarwal, 'Determinants of Foreign Direct Investment: A Survey' [1980] 116 Weltwirtschaftliches Archiv 739. P. 741. Stephen Husted & Michael Melvin, *International Economics* (Pearson 2007). P. 393. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 51.
56. Id.
57. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 25.
58. Id.

or Local Content Requirements (LCR's).[59] Samsung, a South-Korean company, for instance, established itself in the Canadian province of Ontario in order to circumvent the LCR of the support scheme for RES.[60] On the basis of the differential rate of return theory, RES investments would primarily be made in areas with favorable market conditions, such as the abundance of RES or high electricity prices, or – and at present this is more likely the case – in jurisdictions where favorable support schemes are in place that guarantee an favorable rate of return. For example, after putting in place a very generous Feed-in-Tariff (FIT) scheme in 2007, a very significant number of investments were made in the Spanish solar sector, amounting to over 2700-Megawatt (MW) in 2008 which accounted for 50 percent of the globally installed Photovoltaic (PV) capacity that year.[61]

On the basis of the theory of portfolio diversification, it has been argued that FDI flows are not only directed by quests for profit but also by the desire of investors to diversify their portfolio in order to spread and reduce risks.[62] This theory would explain why countries experience FDI inflows and outflows simultaneously.[63] In relation to RES investments this theory is relevant. Since RES is, in many

59. For an explanation of LCR's, see section 3.4.2.1. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 25. Stephen Husted & Michael Melvin, *International Economics* (Pearson 2007). P. 397. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 50.
60. Sustainable Prosperity, 'Domestic Content Requirements for Renewable Energy Manufacturing' (*Sustainable Prosperity,* April 2012) <http://www.sustainableprosperity.ca/sites/default/files/publications/files/Domestic%20Content%20Requirments%20for%20Renewable%20Energy%20Manufacturing.pdf> accessed on 26/05/2016. p. 5. Dawn Kurtz Crompton, 'Cooperative Renewable Energy Policies to Avoid Trade Related Disputes and Litigation' (*University of Delaware,* 2013) <http://www.udel.edu/MAST/873/AP%20Proposals/Dawn%20Kurtz%20Crompton-%20Analytical%20Paper%20Final.pdf> accessed on 26/05/2016. P. 4.
61. FIT's typically provide for a specified price for each unit of energy produced. Pedro A. Prieto, Charles A. S. Hall & Rigoberto Melgar, *Spain's Photovoltaic Revolution: the Energy Return on Investment* (Springer 2013). P. 21.
62. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 26. José S. Lizondo, *Foreign Direct Investment* (International Monetary Fund 1990). P. 3. Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' [2000] 41 Harvard International Law Journal 469. P. 473. Jamuna P. Agarwal, 'Determinants of Foreign Direct Investment: A Survey' [1980] 116 Weltwirtschaftliches Archiv 739. P. 744. Stephen Husted & Michael Melvin, *International Economics* (Pearson 2007). Pp. 393 & 397. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 50.
63. Id.

jurisdictions, still dependent on support to be economically viable, investors might favor investing in several jurisdictions in order to reduce the regulatory risk that support is reduced or withdrawn. That this risk is not merely hypothetical is evidenced by the significant number of RES investment disputes in various countries, as will be illustrated in chapter 3.5.[64]

According to the market size theory, a country will attract FDI when its market is large enough for the exploitation of economies of scale.[65] On a micro-economic level this is usually done by reference to the output of a company and on a macro-economic level by reference to the Gross Domestic Product (GDP) of a State. The idea behind this theory is that TNC's will increase their investment in an economy when sales increase.[66] For example, the Spanish wind turbine manufacturer Gamesa tripled its investment in China in 2010 in order to meet the demand for wind turbines in China.[67]

Flows of FDI may also be explained by the internalization of companies of certain activities into their own supply chain in order to reduce transaction costs and gain other advantages.[68] This could lead to vertical integration.[69] For instance, the US company SolarCity that is active in the development, financing, and installment of PV projects, has recently purchased a PV manufacturer.[70]

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64. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018).
65. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 27. José S. Lizondo, *Foreign Direct Investment* (International Monetary Fund 1990). Pp. 4-5. Jamuna P. Agarwal, 'Determinants of Foreign Direct Investment: A Survey' [1980] 116 Weltwirtschaftliches Archiv 739. P. 746. Stephen Husted & Michael Melvin, *International Economics* (Pearson 2007). P. 398.
66. Jamuna P. Agarwal, 'Determinants of Foreign Direct Investment: A Survey' [1980] 116 Weltwirtschaftliches Archiv 739. P. 746. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 51.
67. Gamesa, 'Gamesa will Triple its Investment in China to Expand and Adapt its Manufacturing Plants for the Local Development of New Turbine Systems' (*Gamesa,* 15 september 2010) <http://www.gamesacorp.com/recursos/noticias/100914-pr-gamesa-china-eng.pdf> accessed on 26/05/2016.
68. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 32. José S. Lizondo, *Foreign Direct Investment* (International Monetary Fund 1990). Pp. 7-8. Jamuna P. Agarwal, 'Determinants of Foreign Direct Investment: A Survey' [1980] 116 Weltwirtschaftliches Archiv 739. Pp. 753-754.
69. In case of vertical integration, a single company owns/carries out various activities in the supply chain of a good or service.
70. Rosana Francescato, 'SolarCity Aim: Most Vertically Integrated Solar Company In World' (*Clean Technica,* 23 June 2014) <http://cleantechnica.com/2014/06/23/solarcity-getting-

The so-called location theory is particularly relevant for the energy sector. This theory argues that certain FDI flows exist because some factors of production are not mobile; such as labor or natural resources.[71] Therefore, one would expect that investments in the upstream oil and gas sector will primarily be made in jurisdictions that are endowed with these natural resources. In a similar vein, one may expect that PV investments are made in sunny areas while investment in wind energy are made in windy areas.

Finally, the presence of political instability and political and/or regulatory risk in a country can have an influence on the inflow of FDI.[72] As Adam Smith already stated in the Wealth of Nations: '[c]ommerce and manufacturers, in short, seldom flourish in any State in which there is not a certain degree of confidence in the justice of government.'[73] Political risk encompasses regulatory changes to the legal and fiscal framework, which can have a significant influence on the economic viability of an investment.[74] This factor plays an important role in investment decisions in the (renewable) energy sector.[75] The lack of political stability might explain, for instance, why North-African countries that have a great potential for RES investments are not at all successful in attracting investors. However, political risk is currently also present in developed countries. At the moment, investors often require investment incentives from the State before making their investment. In these States, one of the most obvious forms of political and regulatory risk is related to amendments to the applicable support scheme. Over the last decade this risk did materialize in various countries where RES investors invested. The regulatory changes made to the RES support scheme in

manufacturing-solar-power-bright-future/> accessed on 26/05/2016. Robert McIntosh & James Mandel, 'Why Solar Installers Are Becoming Vertically Integrated' (*Clean Technica,* 19 July 2014) <http://cleantechnica.com/2014/07/19/5-reasons-solar-installers-integrating-vertically/> accessed on 26/05/2016.

71. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 33. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 50.
72. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 50. José S. Lizondo, *Foreign Direct Investment* (International Monetary Fund 1990). Pp. 17-18.
73. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Wordsworth Editions Ltd 2012). P. 915.
74. José S. Lizondo, *Foreign Direct Investment* (International Monetary Fund 1990). Pp. 17-18. Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice* (Palgrave Macmillan 2002). P. 50.
75. Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). Pp. 3-26.

Spain, for example, had very significant effects on investors. Consequently, RES investors invoked the ECT to obtain redress. The case of Spain will be discussed later in chapter 3.5.

This section has introduced several theories that try to explain why investors engage in investing abroad. In the following section, the importance of transaction costs will be introduced.

2.3. THE NOTION OF TRANSACTION COSTS

In the classic macro-economic liberal theory, as developed by Adam Smith and David Ricardo and introduced in section 2.1 above, international trade would occur as a result of the comparative (dis)advantages between countries concerning the production of goods and services. International trade, however, does not arise spontaneously – it requires market transactions that have to be organized and this entails costs: transaction costs.[76] Traditionally, transaction costs encompass the costs of finding a trading partner, negotiating and concluding contracts as well as enforcing contracts.[77] As Ronald Coase, who is widely considered as the 'founding father' of transaction cost economics, put it in 1960:

> "In order to carry out a market transaction it is necessary to discover who it is that one deals with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up a contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on."[78]

A particularly problematic aspect of market transactions is that economic entities are not necessary fully rational – as some economists like to believe – since they are not capable of acquiring and processing all relevant information necessary to engage in a fully rational transaction that maximizes welfare.[79]

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76. Wetenschappelijke Raad voor het Regeringsbeleid, *Nederland Handelsland – Het Perspectief van de Transactiekosten* (SDU Uitgevers 2003). P. 22.
77. Ronald Coase, 'The Nature of the Firm' [1937] 4 Economica 386. Pp. 390-391.
78. Ronald Coase, 'The Problem of Social Cost' [1960] 3 Journal of Law & Economics 1. P. 15.
79. Michael Dietrich, *Transaction Cost Economics and Beyond – Toward a new Economics of the Firm* (Routledge 1994). P. 16. Herbert Simon, 'Organizations and Markets' [1991] 5 Journal of Economic Perspectives 25.

When interpreted broadly, transactions costs also include the costs related to transport, import duties, taxes, as well as 'investments in legal, social, cultural, and physical capital' required to facilitate transactions.[80] The total costs involved can be very significant: one study found that transaction costs in the US in the year 1970 amounted to 47 to 55 percent of GDP while in Germany they were estimated at 60 to 70 percent of GDP.[81] When transaction costs are too high, favorable economic transactions, that would have been carried out if the pricing mechanism operated without imposing costs, may not take place.[82]

In the RES sector, transaction costs do not only find their origin in the functioning of the market, but investors also deal with policy induced transaction costs, such as administrative requirements and monitoring activities.[83] In particular, as will be referred to at various points throughout this dissertation, trade and investment distorting legislation may impose additional transaction costs on investors by favoring domestic goods and services providers over foreign competitors.

2.4. COST OF CAPITAL

Before taking the decision to invest in a given jurisdiction or project, investors carry out extensive risk assessments that take into account all risks associated with an investment, covering the entire lifetime, that could affect the profitability of an investment.[84] In this process, the general 'investment climate' of a country

80. Wetenschappelijke Raad voor het Regeringsbeleid, *Nederland Handelsland – Het Perspectief van de Transactiekosten* (SDU Uitgevers 2003). Pp. 22-23.
81. Ibid. P. 23. John Wallis & Douglass North, 'Measuring the Transaction Sector in the American Economy, 1870-1970' in Stanley Engerman *et al* (eds.), *Long-Term Factors in American Economic Growth* (University of Chicago Press 1988). Eirik Furubotn & Rudolf Richter, *Institutions and Economic Theory – The Contribution of the New Institutional Economics* (The University of Michigan Press 2000).
82. Ronald Coase, 'The Problem of Social Cost' [1960] 3 Journal of Law & Economics 1. P. 15. See also: Douglas C. North, 'Transaction Costs, Institutions, and Economic History' [1984] 140(1) Journal of Institutional and Theoretical Economics 7. Oliver E. Williamson, 'The Economics of Organization: The Transaction Cost Approach' [1981] 87 American Journal of Sociology 548.
83. Barbara Breitschopf, Anne Held & Gustav Resch, 'A Concept to Assess the Costs and Benefits of Renewable Energy Use and Distributional Effects Among Actors: The Example of Germany' [2016] 27(1) Energy & Environment 55. P. 63.
84. This section draws from an article co-written by the present author, see: Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 7. John Dewar & Oliver Irwin, 'Project Risks' in John Dewar (ed.), *International Project Finance: Law and Practice* (Oxford University Press 2015). P. 85.

plays an important role.[85] The higher the risks associated with an investment, the higher the required rate of return because investors will add a higher risk premium to the proposed investment.[86] This, in turn, also means that the higher the risks associated with an investment the higher the costs of capital and the smaller the pool of investors that are willing to invest. In that regard, reducing investment risks can contribute to investment promotion since a lower risk profile may make a particular investment attractive to a larger pool of investors while at the same time reducing the costs of capital.[87]

The cost of capital, which includes the costs of both debt as well as equity, has been defined as the 'the expected rate of return that market participants require in order to attract funds to a particular investment.'[88] It is, in essence, an opportunity cost since making a particular investment implicates that the investor has to forego the best available alternative.[89] The cost of capital is usually expressed in annual percentage terms and is set by the market.[90] The most important aspect in the valuation process of the cost of capital, which will also run through this dissertation as a common thread, is pricing risk.[91] Risk can be defined as 'the degree of certainty (or lack thereof) of achieving future expectations at the times and in the amounts expected.'[92]

For any investment, the cost of capital will thus be determined by a combination of the following factors:[93]

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85. Phillip Fletcher, 'Approaching Legal Issues in a Project Finance Transaction' in John Dewar (ed.), *International Project Finance: Law and Practice* (Oxford University Press 2011).
86. Shannon Pratt & Roger Grabowski, 'Relationship between Risk and the Cost of Capital' in Shannon Pratt *et al* (eds.), *Cost of Capital: Applications and Examples* (Wiley 2014). Pp. 70-87. Alexander Lehmann, 'Country Risks and the Investment Activity of U.S. Multinationals in Developing Countries' (IMF WP/99/133, 1999). Pp. 21-22. Stephen Arbogast & Praveen Kumar, 'Financing Large Energy Projects' in Betty Simkins *et al* (eds.), *Energy Finance and Economics: Analysis and Valuation, Risks Management, and the Future of Energy* (Wiley 2013). Pp. 332-337.
87. Id.
88. Shannon Pratt & Roger Grabowski, 'Defining Cost of Capital' in in Shannon Pratt *et al* (eds.), *Cost of Capital: Applications and Examples* (Wiley 2014). P. 3.
89. Id.
90. Ibid. Pp. 3-4.
91. Ibid. P. 4.
92. David Laro & Shannon Pratt, *Business Valuation and Federal Taxes: Procedure, Law, and Perspective* (John Wiley & Sons 2010). Chapter 12.
93. Shannon Pratt & Roger Grabowski, 'Relationship Between Risk and the Cost of Capital' in Shannon Pratt *et al* (eds.), *Cost of Capital: Applications and Examples* (Wiley 2014). P. 70.

1) Risk-free rate: this is the rate of return that can be made on an investment without assuming any risk. This is often done by reference to the yield to maturity on government bonds of countries like Germany or the US, *i.e.* countries that are unlikely to default on their financial obligations.

2) Risk premiums: this is the rate of return over and above the risk-free rate that is aimed at compensating the investor for accepting the risks associated with an investment.

As said, the higher the risk associated with an investment, the higher the cost of capital will be.[94]

Political and regulatory risks are mayor concerns for every RES project.[95] This statement holds true for RES investment in both developed and developing countries.[96] Investments in the energy sector are particularly exposed to a relatively high level of regulatory and political risk: investments are often made for the long term and the private and public interests involved are usually significant.[97] During the long life span of energy investments 'economic cycles change, elections are held and other significant political and social changes are expected to occur.'[98] Since the RES sector is highly innovative, this means that technical risks may be significant if new technologies are involved. Therefore, even when such investments are made in jurisdictions with a low general risk profile, the risks may still be significant.

Reducing the cost of capital is of great importance for reducing the LCOE from RES sources. As a report demonstrates, reducing the cost of capital from 10 percent to 5 percent, as has approximately happened in the North Sea offshore wind sector, reduced the LCOE of the project by over 30 percent.[99]

94. Ibid. Pp. 70 & 76.
95. John Dewar & Oliver Irwin, 'Project Risks' in John Dewar (ed.), *International Project Finance Law and Practice* (Oxford University Press 2015). P. 85.
96. For an assessment of the EU, see: Luc van Nuffel, Koen Rademaekers, Jessica Yearwood & Verena Graichen, 'European Energy Industry Investments' (European Union 2017). Pp. 48-49.
97. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 8.
98. Id.
99. Giles Hundleby, 'LCOE – Weighted Cost of Capital (WACC)' <https://bvgassociates.com/lcoe-weighted-average-cost-capital-wacc/> accessed on 30/01/2019. Cees Verburg &

The importance of reducing the cost of capital for RES investments in order to increase the competitiveness of RES can therefore not be understated, nor can the importance of reducing risks associated with investment be understated simply because the two are so closely related.

Thus far, investments in the RES have been considered as 'regulatory driven', meaning that investments will be made in those jurisdictions where favorable conditions for investments were created, for example by providing for financial and/or regulatory support.[100] This reliance on support measures also exposes the investments to a particular kind of regulatory risk, namely that the support will be altered or withdrawn during the lifetime of an investment.[101] As will be discussed in the next chapter, this risk is not merely hypothetical.

2.5. CONCLUSION

After having discussed the issues above, the first sub-question can now be answered. This question read:

> 'On the basis of economic theory, what factors are to be taken into account for the investment chapter of the ECT to enhance economic efficiency of RES investments and reduce associated risks?'

On the basis of the above, it becomes clear that the following factors should be kept in mind:

- On the basis of economic liberal theory, which underlies much of the international economic regime currently in existence, undistorted investment and trade in the RES sector can reduce the costs of, for example, RES generation equipment: specialization may lead to comparative advantages that can result in economies of scale which can result in lower prices.

Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 4.

100. Petri Mäntysaari, *EU Electricity Trade Law – The Legal Tools of Electricity Producers in the Internal Electricity Market* (Springer 2015). P. 445.
101. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 9.

· FDI in the RES sector can, from a macro-economic point of view, result in more economic activity in a given State as well as create jobs, enhance competition, result in the transfer of technology and lead to more integration in the world economy. In the past some of these arguments were contested by States that favored domestic oriented economic development policies. However, since the early 1990's, many States that previously resisted economic liberalism have revised their positions. One could argue that the ECT itself is evidence of this.

· From a micro-economic point of view, it may allow investors to obtain higher rates of return, diversify risk, avoid trade barriers, and integrate economic activities in their own supply chain.

· In particular the necessity to reduce risk is important, not only for investors themselves, but also for the energy transition in general since the cost of capital significantly affects the LCOE of a given project. This means that countries where political and regulatory risks are perceived as high may be unsuccessful in attracting FDI which may adversely affect their energy transition if insufficient domestic financial resources are available to finance RES projects. Furthermore, due to the innovative character of the RES sector, capital may itself be already more expensive than economic sectors that are perceived as less risky. Also, States ought to be aware that RES policy can either reduce risk, as may be the case of FITs which in essence should guarantee the price of electricity, or increase risk, for example when trade and investment barriers increase the level of risk associated with an investment.

· In addition to raising risks associated with investments, barriers to trade and investment may also increase transaction costs. For example, when a foreign investor is compelled, by virtue of a LCR, to cooperate with domestic goods and services suppliers instead of with known foreign alternatives with proven track records in the industry, the investor will have to establish the financial and technical capabilities of potential suppliers. Since RES projects are usually preceded by extensive risks analysis, this may make certain transactions more costly than necessary.

CHAPTER 3.

The Energy Sector and Renewable Energy Sources

3. THE ENERGY SECTOR AND RENEWABLE ENERGY SOURCES

Since this dissertation concerns the application of international investment law in a specific sector, namely the renewable energy sector, this chapter will briefly outline to organization of the energy sector. Subsequently, the main investors in the RES sector will be introduced. This will primarily concern investors in larger projects where RES generate electricity. Thereafter, I will explain the interrelatedness of international investment and trade in the RES sector, where a distinction will be made between the value chain of generation equipment and the development of RES projects. Subsequently, the main barriers to investment and trade – both in goods and services – will be introduced. Where it concerns barriers to trade – in both goods and services – specific emphasis will be on trade barriers that affect investment and where one can make a connection to provisions often found in investment treaties. Finally, this chapter will illustrate the regulatory risks to which RES investors are exposed by reference to developments in the Spanish RES sector where regulatory changes adversely affected investors which has resulted in dozens of investor-State disputes.

3.1. THE ORGANIZATION OF THE ENERGY SECTOR AND CHALLENGES FOR THE ENERGY TRANSITION

In order to appreciate the peculiarities of investing in the (renewable) energy sector, this section will briefly outline the organization of the energy sector and highlight the challenges that the sector is facing concerning the energy transition. Since most forms of RES generate a form of energy into electricity, I will exclusively focus on the electricity sector.

Physically, electricity is nothing more than a flow of electrons. However, the fact that it is not tangible and cannot be stored easily on a large scale has significant implications for the organization of the sector.[1] For example, an electricity grid has to be in balance at any given time, which means that electricity supply and demand must always meet, otherwise blackouts may occur.[2] The demand for

1. Glen Swindle, *Valuation and Risk Management in Energy Markets* (Cambridge University Press 2014). Pp. 63-64. Delia Vasilica Rotaru, 'Specifics of the Energy Markets' (2014) CES Working Papers Vol. 6 Issue 3. P. 77.
2. Delia Vasilica Rotaru, 'Specifics of the Energy Markets' (2014) CES Working Papers Vol. 6 Issue 3. P. 77. Corinna Klessmann, Christian Nabe & Karsten Burges, 'Pros and cons of exposing renewables to electricity market risks— A comparison of the market integration

electricity was traditionally relatively inelastic, which means that the balance must primarily be achieved on the supply side.[3]

In the production segment of the electricity supply chain, electricity is generated by transforming primary forms of energy, either fossil or renewable, into electricity.[4] Since the Second World War, large production facilities would be connected to high voltage transmission lines that transported the electricity from the generation facility to the demand centers. Customers connected directly to the transmission grid include large industrial customers as well as the low voltage distribution networks. At the distribution level, the supply and sale of electricity to customers takes place.[5] The distribution network is often connected to the transmission grid at various points and, contrary to the transmission network, delivers electricity to a (very) large number of (smaller) customers.

Since the transmission and distribution of electricity depends on the availability of a grid, the electricity sector is network bound and it is recognized that this represents a natural monopoly.[6] That is to say, due to the extremely high fixed costs of a transmission and distribution network, it does not make economic sense for different market entities to construct their own network. This was also one of the reasons that in the past many electricity markets were vertically integrated, which means that several stages of the electricity supply chain were in the hands of the same company.[7] Often, but not necessarily always, these companies were owned by the (local) government.[8] As of today, the electricity

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approaches in Germany, Spain, and the UK' [2008] 36 Energy Policy 3646. P. 3647.

3. Corinna Klessmann, Christian Nabe & Karsten Burges, 'Pros and cons of exposing renewables to electricity market risks— A comparison of the market integration approaches in Germany, Spain, and the UK' [2008] 36 Energy Policy 3646. P. 3647.
4. Darryl R. Biggar & Mohammad Hesamzadeh, *The Economics of Electricity Markets* (Wiley 2014). Pp. 45-46.
5. Glen Swindle, *Valuation and Risk Management in Energy Markets* (Cambridge University Press 2014). P. 64.
6. Glen Swindle, *Valuation and Risk Management in Energy Markets* (Cambridge University Press 2014). P. 64. Darryl R. Biggar & Mohammad Hesamzadeh, *The Economics of Electricity Markets* (Wiley 2014). P. 59. Delia Vasilica Rotaru, 'Specifics of the Energy Markets' (2014) CES Working Papers Vol. 6 Issue 3. P. 78.
7. Glen Swindle, *Valuation and Risk Management in Energy Markets* (Cambridge University Press 2014). P. 64. Darryl R. Biggar & Mohammad Hesamzadeh, *The Economics of Electricity Markets* (Wiley 2014). P. 77. Delia Vasilica Rotaru, 'Specifics of the Energy Markets' (2014) CES Working Papers Vol. 6 Issue 3. P. 78.
8. Darryl R. Biggar & Mohammad Hesamzadeh, *The Economics of Electricity Markets* (Wiley 2014). P. 77. In the United States, for example, many electricity supply companies were owned by private investors. See: Severin Borenstein & James Bushnell, 'The U.S. Electricity Industry after 20 Years of Restructuring' (2015) Energy Institute at Haas

markets in various parts of the world have been privatized and liberalized to various degrees.[9] Due to these developments it has become easier for private entities to enter the electricity market and generate and sell electricity. Therefore, liberalized electricity markets might be more open to investors that want to generate and sell electricity, including those that make use of RES.

As becomes clear from the above, the supply chain of electricity was designed in a top-down way, which is to say that the generation took place at the top and that through transmission and distribution, the electricity was consumed at the bottom. However, a significant amount of the renewable electricity is being produced by decentralized generators, such as rooftop PV panels and individual wind turbines at the distribution level.[10] This means that the supply chain of renewable electricity does not necessarily follow the traditional pattern as outlined above. Instead, the vertically-designed supply chain with a unidirectional electricity flow will have to evolve into a more horizontal system that allows for bidirectional flows of electricity.[11] For the purpose of this dissertation, it suffices to say that adapting the structure of the electricity supply chain to this new reality poses significant technical and legal challenges that will have to be resolved.[12]

Working Paper <https://ei.haas.berkeley.edu/research/papers/WP252.pdf> accessed on 06/09/2016. P. 2.

9. Darryl R. Biggar & Mohammad Hesamzadeh, *The Economics of Electricity Markets* (Wiley 2014). Pp. 46 & 82-85..
10. Jennie C. Stephens, Elizabeth J. Wilson & Tarla Rai Peterson, *Smart Grid (R)Evolution* (Cambridge University Press 2015). P. 53. P.J.F. Torres, L. Ekonomou & P. Karampelas, 'The Correlation Between Renewable Generation and Electricity Demand: A Case Study of Portugal' in P. Karampelas *et al* (eds.), *Electricity Distribution: Intelligent Solutions for Electricity Transmission and Distribution Networks* (Springer 2016). Pp. 130-131.
11. Jens Christian Boemer, *On Stability of Sustainable Power Systems - Network Fault Response of Transmission Systems with Very High Penetration of Distributed Generation* (CPI-Koninklijke Wöhrmann 2016). P. V. Final Report to the European Commission, 'Study on the Effective Integration of Distributed Energy Resources for Providing Flexibility to the Electric System' (2015) <https://ec.europa.eu/energy/sites/ener/files/documents/5469759000%20Effective%20integration%20of%20DER%20Final%20ver%202_6%20April%202015.pdf> accessed on 06/09/2016. Pp. 32-33. P.J.F. Torres, L. Ekonomou & P. Karampelas, 'The Correlation Between Renewable Generation and Electricity Demand: A Case Study of Portugal' in Panagiotis Karampelas *et al* (eds.), *Electricity Distribution: Intelligent Solutions for Electricity Transmission and Distribution Networks* (Springer 2016). Pp. 130-131.
12. See for example: Imke Lammers & Lea Diestelmeier, 'Experimenting with Law and Governance for Decentralized Electricity Systems: Adjusting Regulation to Reality?' [2017] 9 Sustainability 212. Pp. 214-215. Martha Roggenkamp & Hannah Kruimer, 'EU Climate Regulation and Energy Network Management' in Edwin Woerdman *et al* (eds.), *Essential EU Climate Law* (Edward Elgar 2015).

Another peculiar aspect of RES that is worth mentioning relates to the costs structure thereof. The fixed costs of RES generation facilities are usually large but the subsequent marginal costs to produce an additional unit of energy are rather low to non-existent since wind and solar radiation are free.[13] In that regard it has been said that '[b]uilding a renewable energy plant is similar to building a fossil energy plant plus buying all the fuel that the plant will use over its lifetime.'[14] The only recurring costs of these RES are related to operation and maintenance of the facility.[15] Notwithstanding the low marginal costs, the final LCOE may still be relatively high for some RES because of the high fixed costs, although RES are gradually becoming more price competitive.[16]

Despite the fact that the LCOE of RES are relatively high, their increasing penetration in primarily the electricity sector is having a profound impact on the functioning of electricity markets. This is particularly relevant for RES investors that have invested in jurisdictions where RES generators are exposed to market signals. The existing effects of RES arise mainly because of the low marginal costs of RES, which is creating a downward pressure on wholesale electricity prices.[17] This has several consequences.

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13. Geoffrey Heal, 'The Economics of Renewable Energy' (2009) NBER Working Paper Series No. 15081. <http://www.nber.org/papers/w15081.pdf> accessed on 07/04/2016. P. 4. David Timmons, Jonathan Harris & Brian Roach, 'The Economics of Renewable Energy' (2014) Global Development and Environment Institute. <http://www.ase.tufts.edu/gdae/education_materials/modules/renewableenergyecon.pdf> accessed on 07/04/2016. P. 22. Cheuk Wing Lee & Jin Zhong, 'Financing and Risk Management of Renewable Energy Projects with a Hybrid Bond' [2015] 75 Renewable Energy 779. P. 780.
14. David Timmons, Jonathan Harris & Brian Roach, 'The Economics of Renewable Energy' (2014) Global Development and Environment Institute. <http://www.ase.tufts.edu/gdae/education_materials/modules/renewableenergyecon.pdf> accessed on 07/04/2016. P. 22.
15. Geoffrey Heal, 'The Economics of Renewable Energy' (2009) NBER Working Paper Series No. 15081. <http://www.nber.org/papers/w15081.pdf> accessed on 07/04/2016. P. 4.
16. International Energy Agency, 'Projected Costs of Generating Electricity' (*International Energy Agency*, 2015) <https://www.iea.org/Textbase/npsum/ElecCost2015SUM.pdf> accessed on 08/04/2016. Pp. 4-5.
17. José Pablo Chaves-Ávila, Klaas Würzburg, Tomás Gómez & Pedro Linares, 'The Green Impact: How Renewable Sources Are Changing EU Electricity Prices' [2015] 13 IEEE Power and Energy Magazine 29. P. 32. Dogan Keles, Massimo Genoesa, Dominik Möst, Sebastian Ortlieb & Wolf Fichtner, 'A Combined Modeling Approach for Wind Power Feed-in and Electricity Spot Prices' [2013] 59 Energy Policy 213. Pp. 213-214. Paul Deane, 'Quantifying the "Merit-Order" Effect in European Electricity Markets' (2015) Rapid Response Energy Brief <http://www.kic-innoenergy.com/wp-content/uploads/2016/03/RREB_III-Merit_order_Final.pdf> accessed on 09/09/2016. P1. Malcolm Keay, 'Electricity Markets are Broken – Can they be Fixed?' (2016) Oxford Institute for Energy Studies Paper: EL 17 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Electricity-markets-are-broken-can-they-be-fixed-EL-17.pdf> accessed on 09/09/2016. P. 10.

Firstly, it has become challenging for non-RES generators to recover their fixed costs which disincentives investment in new generation facilities that may be necessary as back up, while it incentives continued use of old facilities that have been written off.[18] Secondly, RES producers whose generated electricity is dispatched in priority, which may be required by law and entails that electricity produced from RES will be fed into the grid in priority, barely have an incentive to cease production.[19] Since electricity cannot be stored easily, this means that electricity markets with large quantities of RES may experience negative prices on windy and sunny days.[20] The greater the share of RES in a given market, the more pressing these issues become and the greater the risk of imbalance of the electricity grid.

3.2. INVESTORS IN THE RENEWABLE ENERGY SECTOR

This section will explore what actors are currently engaged in RES investments and, therefore, may benefit from the legal framework of the ECT. Since the scope of application of the investment provisions of the ECT is determined by the definition of 'investor' contained in Art. 1(7) ECT, it is briefly recalled here:

> ""Investor" means:
>
> a) With respect to a Contracting Party:
>
> i) A natural person having the citizenship of nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

18. The International Energy Agency observed that investments in conventional power generation have essentially come to a halt in Europe in 2015. See: International Energy Agency, 'World Energy Investment 2016' (International Energy Agency, 2016) < https://www.iea.org/Textbase/npsum/WEI2016SUM.pdf> accessed on 22/09/2016. P. 16. Malcolm Keay, 'Electricity Markets are Broken – Can they be Fixed?' (2016) Oxford Institute for Energy Studies Paper: EL 17 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Electricity-markets-are-broken-can-they-be-fixed-EL-17.pdf> accessed on 09/09/2016. P. 10-11. Corinna Klessmann, Christian Nabe & Karsten Burges, 'Pros and cons of exposing renewables to electricity market risks— A comparison of the market integration approaches in Germany, Spain, and the UK' [2008] 36 Energy Policy 3646. P. 3649.
19. Malcolm Keay, 'Electricity Markets are Broken – Can they be Fixed?' (2016) Oxford Institute for Energy Studies Paper: EL 17 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Electricity-markets-are-broken-can-they-be-fixed-EL-17.pdf> accessed on 09/09/2016. P. 12.
20. Ibid. Pp. 5-6.

ii) A company or other organization organized in accordance with the law applicable in that Contracting Party;"

This provision clearly states that 'investors' can be both natural and legal persons. Traditionally, investments in the energy sector were characterized as 'large' and 'long-term'.[21] Therefore, 'traditional' investors are often corporate entities, as is evidenced by the fact that most investment claims under the ECT have been brought by corporations, although there are a few examples to the contrary.[22] While many forms of RES, such as hydro, thermal solar, tidal, biomass, and wind still require significant investments, forms such as PV solar and geothermal can more easily be exploited by less wealthy investors. This makes it more likely that natural persons may invoke the provisions of the ECT.[23]

Even though smaller investors are increasingly able to participate in the financing of RES projects through innovative ways, such as crowdfunding, this section will primarily focus on the larger RES investors that are engaged in transboundary projects.[24] Attention will be paid to diverging investment motives and strategies.

Electricity production and/or supply companies, both major international and national ones, are an obvious category of investors.[25] These companies invest

21. Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). P. xlvii.
22. See for example: *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18. *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC - Case No. V (064/2008). *Anatolie and Gabriel Stati, Ascom Group S.A., Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC – Case No. 116/2010.
23. Of the 'Solar Panel' cases based on the ECT, the following were brought by at least one natural person: *Antaris Solar and Dr. Michael Göde v. Czech Republic*, UNCITRAL Ad hoc, PCA Administered. *Mathias Kruck, Ralf Hofmann, Frank Schumm, Joachim Kruck, Peter Flachsmann, Rolf Schumm, Karsten Reiss, Jürgen Reiss v. Kingdom of Spain*, ICSID Case No. ARB/15/23. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3.
24. Dinand Drankier, 'Het Participatie- en Financieringstekort in de Energietransitie: Crowdfunding als Panacee?' [2017] 6 Nederlands Tijdschrift voor Energierecht 262. David Blair, Mark Wesker, Alan John & Aisling Pringleton, 'Review of Crowdfunding Regulation & Market Developments – Unleashing the Potential of Crowdfunding for Financing Renewable Energy Projects' (Osborne Clark 2015).
25. Luc van Nuffel, Koen Rademaekers, Jessica Yearwood & Verena Graichen, 'European Energy Industry Investments' (European Union 2017). Pp. 80-81. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. Pp. 4-7. For example, Eneco is currently the sole remaining owner of the Amalia Wind park while HVC Energie 10 percent stake in the Gemini Wind park, both

in RES projects to diversify their portfolio and adapt to a changing market that increasingly demands renewable energy.[26] The increasing share of renewables has, as explained above, put a downward pressure on electricity prices, making RES attractive because it can still count on lucrative government support.[27]

Independent power producers form a second group of investors that actively engage in RES investments.[28] These producers generate electricity to sell it directly to either supply companies or large end users. Their activities are usually restricted to electricity production and they do not sell electricity directly to small consumers.[29]

Original Equipment Manufacturers (OEMs), primarily those of PV panels and wind turbines, are also investing significantly in RES projects as equity participants.[30] Their primary investment motive is to ensure sales for their equipment in a market that has become very competitive due to overcapacity.[31] In return of supplying

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located before the coast of the Netherlands. The Trianel Wind farm near the German island of Borkum is an example of a joint venture of 33 municipal electricity companies from the Netherlands, Germany, Switzerland, and Austria. The German offshore wind parks Sandbank and DanTysk are both joint ventures between Vattenfall (51 percent in each wind park) and Stadtwerke München (49 percent in each wind park).

26. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. Pp. 4-7.
27. Id.
28. Sebastian Zank, Timo Schilz, Britta Holt & Florian Stapf, 'European Alternative Energy – Application study & Outlook' (*Scope Ratings,* 2 March 2015) <https://www.scoperatings.com/scoperatings/study/download%3Bjsessionid=01545FFE5F32E096689811067E181984?id=475c2cce-dc53-4811-8c97-368602a5516d&q=1> accessed on 31/05/2016. P. 4. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 8.
29. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 8. Silver Ridge Power B.V. and Alten Renewable Energy B.V. are examples of independent power producers active in various countries that are currently engaged in ECT proceedings.
30. For example, Siemens Wind Power holds a 20 percent share in the Gemini Windfarm in the Netherlands. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 11.
31. Id.

generation equipment for a particular project, participants in that project may demand an equity participation by the OEM. For the other project partners, this is an effective manner to hedge risks associated with the design and construction of the project. Therefore, OEMs will primarily get involved in a project at a very early stage. Their intention, however, is often not to remain a project partner for the long-term. A few years after the project has become operational is usually the moment that these investors divest their share in a project to recycle their capital.[32]

For similar reasons, contractors may also become equity participant in RES projects. In offshore wind projects, maritime engineering companies are increasingly assuming the role of equity partner.[33]

Infrastructure funds also engage in RES investments.[34] These funds are often seeking low-risk and long-term investments with stable yields.[35] Therefore, they often enter a project at a rather late stage, preferably at the operational phase.[36] Infrastructure funds are often passive participants in projects and therefore prefer project partners with significant operating experience.[37]

Private equity funds are usually looking for more risky investments that yield higher returns.[38] Investments by private equity funds are often made at an

32. Id.
33. Van Oord, for example, is a project partner in the Gemini wind farm and successfully applied for a tender to build a wind farm of the coast of Zeeland together with other partners. Likewise, DEME is a project partner in German and Belgian wind parks.
34. Luc van Nuffel, Koen Rademaekers, Jessica Yearwood & Verena Graichen, 'European Energy Industry Investments' (European Union 2017). P. 80. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 12. Sophie Justice, 'Private Financing of Renewable Energy' (*Chatham House,* December 2009) <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/1209_financeguide.pdf> accessed on 01/06/2016. P. 7.
35. Id.
36. Id.
37. Id.
38. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 13. Sophie Justice, 'Private Financing of Renewable Energy' (*Chatham House,* December 2009) <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/1209_financeguide.pdf> accessed on 01/06/2016.

earlier stage of project development than those by infrastructure funds, at the development or construction phase. However, private equity funds tend to hold on to their investment for a shorter period of time.[39]

The last few years, infrastructure and private equity funds are increasingly confronted with competition from institutional investors, such as pension funds and insurance companies.[40] These latter investors used to invest in RES projects through the former but the volatile equity markets and low returns on bonds have forced these investors to engage more directly in RES projects.[41] The investment will often be made for the long-term but usually only a few years after commissioning of the project to minimize risks associated with the early stages of project development.[42] Both insurance companies (20-100 mln) and pension funds (100-250 mln) are often in the market for large investments per transaction, which limits the pool of potential investments primarily to offshore wind farms or portfolios of RES assets.[43] Moreover, given the aim of institutional

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P. 7. Luc van Nuffel, Koen Rademaekers, Jessica Yearwood & Verena Graichen, 'European Energy Industry Investments' (European Union 2017). P. 80.

39. Id.
40. In 2010, for example, the Dutch pension fund PGGM acquired a minority stake in the Walney offshore wind farm from Dong Energy. Tom Murley, 'EU Renewable Energy Infrastructure Market Report' (*Two Lights Energy Advisors*, 2016) <http://www.twolightsenergy.com/images/Research/2016/Two%20Lights%20EU%20Q4%202016%20Report.pdf> accessed on 12/09/2017. Luc van Nuffel, Koen Rademaekers, Jessica Yearwood & Verena Graichen, 'European Energy Industry Investments' (European Union 2017). P. 80.
41. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 14. Sophie Justice, 'Private Financing of Renewable Energy' (*Chatham House,* December 2009) <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/1209_financeguide.pdf> accessed on 01/06/2016. P. 7.
42. Id. Tom Murley, 'EU Renewable Energy Infrastructure Market Report' (*Two Lights Energy Advisors*, 2016) <http://www.twolightsenergy.com/images/Research/2016/Two%20Lights%20EU%20Q4%202016%20Report.pdf> accessed on 12/09/2017.
43. This is primarily due to the high acquisition costs associated with these transactions. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 14. Sophie Justice, 'Private Financing of Renewable Energy' (*Chatham House,* December 2009) <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/1209_financeguide.pdf> accessed on 01/06/2016. P. 7.

investors to invest in low-risk projects in jurisdictions that entail little political risk, their geographic scope is primarily restricted to North-West Europe.[44]

A relatively new form of investor in RES is a so-called 'YieldCo'.[45] These companies usually have a sponsor company that puts a cash-generating asset, or a portfolio thereof, in a limited liability company which than goes public with the aim of raising capital.[46] This form of investment structure allows small investors to participate in larger projects, also abroad, because they can simply obtain shares of such a company. An additional benefit may be that investment protection may be obtained through YieldCo's that, otherwise, would have been unavailable.[47] Also, it allows small investors to unite in a YieldCo by swapping investment in RES installations for shares in a YieldCo, which strengthens the bargaining power of RES investors.[48]

3.3. THE INTERRELATEDNESS OF INVESTMENT AND TRADE IN THE RENEWABLE ENERGY SECTOR

From a legal perspective, it seems that the international rules concerning investment and trade have developed into two almost separate fields of 'international law' since the failure of the International Trade Organization in the late 1940's.[49] In practice, however, there is an important relationship between trade and investment. One of the main arguments of this dissertation will be that any legal framework that is aimed at facilitating RES investments should

44. Id.
45. Clean Energy Pipeline, 'The European Renewable Energy Investor Landscape' (*Global Capital Finance & Clean Energy Pipeline,* 2014) <http://cleanenergypipeline.com/Resources/CE/ResearchReports/The%20European%20Renewable%20Energy%20Investor%20Landscape.pdf> accessed on 31/05/2016. P. 16.
46. EY, 'The YieldCo Structure – Unlocking the Value in Power Generation Assets (*EY,* 2015) <http://www.ey.com/Publication/vwLUAssets/ey-yieldco-brochure/$FILE/ey-yieldco-brochure.pdf> accessed on 01/06/2016. P. 3.
47. See for example the YieldCo European Solar Holdings N.V., a limited liability company incorporated in the Netherlands. This company actively advertises with offering investment protection to investors. See: <http://www.europeansolarholdings.com/> accessed on 01/06/2016.
48. Ben Willis, 'Solar Yield Co Launched to 'Protect EU PV Investors'' (*PV Tech,* 2014) <http://www.pv-tech.org/news/solar_yield_co_launched_to_protect_eu_pv_investors > accessed on 09/02/2017.
49. Mark Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Zachary Douglas *et al* (eds.), *The Foundations of International Investment Law – Bridging Theory into Practice* (Oxford University Press 2014). P. 172.

acknowledge and reflect this interrelatedness as a barrier to investment may constitute a barrier to trade, in goods and/or services and vice versa.

This section will briefly clarify the link between investment and trade in the RES sector. It is argued that any legal framework which is aimed at facilitating investments in the RES sector should take into account the entire value chain of RES, including the value chain of generation equipment and project development.

3.3.1. The Value Chain of Renewable Energy Generation Equipment

On various occasions, the OECD has identified that the value chain of RES generation equipment is increasingly globally organized.[50] This means that RES generation equipment is manufactured and traded in GVC's. GVC's have been described as follows:

> "GVCs encompass the full range of activities that are required to bring a good or service from conception through the different phases of production – provision of raw materials; the input of various components, subassemblies, and producer services; the assembly of finished goods – to delivery to final consumers, as well as disposal after use."[51]

The consequence of GVC's is that goods that are produced by a company from a specific country, say Vestas from Denmark, may contain relatively few – or even none – components that actually originate in Denmark. Thus, a wind turbine may be designed in one country, while components are made in another country, assembled in yet another country, branded in a fourth country and sold in a fifth country.[52]

Notwithstanding the general trend towards GVC's of RES generation equipment, the value chain may differ to some extend depending on the technology. In

50. OECD, *OECD Business and Finance Outlook 2016* (2016). P. 159. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and Investment* (2015). Pp. 59-60.
51. Olivier Cattaneo, Gary Gereffi & Cornelia Staritz, 'Global Value Chains in a Postcrisis World: Resilience, Consolidation, and Shifting End Markets' in Olivier Cattaneo *et al* (eds.), *Global Value Chains in a Postcrisis World: A Development Perspective* (World Bank 2010). P. 1.
52. Veena Jha, 'Trade Flows, Barriers and Market Drivers in Renewable Energy Supply Goods: The Need to Level the Playing Field' (ICTSD issue Paper No. 10, 2009). P. 2.

the case of solar PV, panels can easily be assembled in China, incorporating components that originate elsewhere, and from there be shipped easily to any destination in the world in containers. In the case of wind energy, the story is more complicated given the size of contemporary wind turbines. Hence, it may be more convenient to assemble them relatively close to a project site in order to mitigate challenges associated with transport and logistics.[53]

Besides the global organization of value chains in the RES sector, it is notable that much of the current world trade is actually intra-firm trade: meaning that goods, often intermediate goods, which are traded internationally are traded within the same company. For example, a wind turbine manufacturer may ship components from various jurisdictions to an assembly facility in the proximity of a project. In this scenario, the trade cannot take place without an investment: in order for international trade to be intra-firm, the company has to set up a local subsidiary in the jurisdictions involved.[54] According to the OECD, this is one of the reasons that investment and trade should ideally be regulated through comprehensive agreements that address both.[55]

3.3.2. Project Development and Equity Participation by Suppliers

Having discussed the value chain of RES generation equipment, the next step becomes project development where generation equipment is deployed. Especially in the value chain of project development there is great potential for host States to reap the economic benefits of RES even if the country is only marginally involved in the manufacturing process of RES generation equipment.[56] According to the International Renewable Energy Agency (IRENA), PV modules only account for 30 percent of the costs of a PV project, inverters for 10 percent and the remaining 60 percent is spent on so-called balance of system costs.[57] This latter category includes various costs, such as non-module hardware (cables, grid connection, racking and mounting, safety and security, and monitoring and control), installations costs (mechanical and electric installations and inspection),

53. H. Bucher, J. Drake-Brockman, A. Kasterine & M. Sugathan, *Trade in Environmental Goods and Services: Opportunities and Challenges* (International Trade Centre Technical Paper, 2014). P. 20.
54. OECD, *Intra-Firm Trade: Patterns, Determinants and Policy Implications* (OECD Trade Policy Working Paper No. 114, 2011). P. 8.
55. Id.
56. Diala Hawila & Arslan Khalid, 'Renewable Energy Benefits – Leveraging Local Capacity for Solar PV' (IRENA 2017). P. 11.
57. Ibid. P. 10.

and certain soft costs (application for financial support, permitting, system design, acquisition and financing costs, and operational costs).[58]

At the stage of project development investment and trade in goods and services are again interrelated. Firstly, as discussed in section 3.2., OEM's of generation equipment or contractors active in the RES sector regularly participate in projects as equity partner: in exchange for their equity participation they may deliver required goods and services that are necessary for completion of the project. Thus, when a OEM participates in a foreign project as equity partner it will most likely deliver the required goods that are subsequently traded internationally.

Furthermore, at the stage of project development RES services are of great importance. The market for RES services has been estimated at twice the size of RES goods.[59] In practice, OEM's often sell goods in combination with the required services relating to engineering, transport, constructions, and maintenance.[60] The reason that trade in goods and services in the RES sector are intrinsically intertwined is related to the high tech nature of the sector: it has been said that the development of RES technology lies 'around the top of the complexity ladder.'[61] This means that the purchaser of a wind turbine will most likely not only be interested in the physical hardware, but also in the knowledge and skills required to deploy and operate a wind turbine. Consequently, 'they seek to acquire these goods in combination with ancillary services such as installation, technical support, training and maintenance.'[62] The less mature a market for RES goods and services is in a given market, the more inputs will have to be imported. According to the OECD, wind and solar projects in the least-developed countries are particularly reliant on imported goods and services because of the lack of a local industry.[63]

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58. Michael Taylor, Pablo Ralon & Andrei Ilas, 'The Power to Change: Solar and Wind Cost Reduction Potential to 2025' (IRENA 2016). P. 31.
59. Joachim Monkelbaan, 'Using Trade for Achieving the SDGs: The Example of the Environmental Goods Agreement' [2017] 51 Journal of World Trade 575. P. 584.
60. United States International Trade Commission, *Renewable Energy and Related Services: Recent Developments* (Investigation No. 332-534, August 2013). Pp. xix and xx. Ricardo Meléndez-Ortiz & Mahesh Sugathan, 'Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – Synthesis of the Policy Options' [2017] 51 Journal of World Trade 933. P. 944. Tilak Doshi, *Sector Study on Environmental Services: Renewable Energy* (APEC Policy Support Unit, 2017). Pp. 3-5.
61. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 9.
62. Id.
63. Ronald Steenblik & Massimo Geloso Grosso, 'Trade in Services Related to Climate

To understand the link between trade in services and investment, the four 'modes' of services supply as defined by the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) will briefly be introduced:[64]

> 1) 'from the territory of one Member into the territory of any other Member' (cross border supply or mode 1). For example, a lawyer from Amsterdam who advises clients in Tokyo.
>
> 2) 'in the territory of one Member to the service consumer of any other Member' (consumption abroad or mode 2). For example, a tourist visiting a museum abroad or a student attending a university abroad.
>
> 3) 'by a service supplier of one Member, through commercial presence in the territory of any other Member' (commercial presence or mode 3). For example, the Royal Bank of Scotland establishing a subsidiary in the US. This mode of services supply is very closely related to investment as the supply of services through this mode by definition requires an investment. It is on the basis of this mode of supply that GATS liberalizes FDI.
>
> 4) 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member' (presence of natural persons or mode 4). An engineer who travels abroad to engage in a construction project.

In practice, mode 3 – the establishment of a local presence, which by definition requires an investment – is by far the most important mode of services supply. Estimates by the WTO Secretariat over the year 2011 suggest that trade through mode 3 accounted for approximately 55 percent of the value of all services trade.[65] Various sources indicate that the same holds true of RES services.[66]

Change: An Exploratory Analysis' (OECD, 2011). P. 10.

64. See: Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law – Text, Materials and Commentary* (Hart Publishing 2012). P. 639.
65. The same research estimates that Mode 1 provides for 30 percent, Mode 2 for 10 percent and Mode 4 for merely five percent. See: Rainer Lanz & Andreas Maurer, 'Services and Global Value Chains – Some Evidence on Servicification of Manufacturing and Services Networks' (WTO Working Paper No. ERSD-2015-03 2015). P. 13.
66. United States International Trade Commission, *Renewable Energy and Related Services: Recent Developments* (Investigation No. 332-534, August 2013). P. 2-19. Jehan Sauvage

At the stage of project development, investment and trade in goods and services are thus also strongly interrelated. This in turn means that barriers to investment, and trade in goods and/or services in the RES sector should not be considered independently as a barrier to one may indirectly constitute a barrier to all three.[67]

3.4. BARRIERS TO INVESTMENT AND TRADE IN THE RENEWABLE ENERGY SECTOR

Having established the link between investment and trade in the RES sector, this section will identify some of the most recurrent barriers to investment and trade. As will be seen, there is a relatively high level of protectionism in the RES sector.

3.4.1. Barriers to Investment

Direct general barriers to investment may include discriminatory screening procedures and restrictions on the acquisition of land and real estate by foreigners.[68] Indirect investment barriers may be closely related to trade barriers and will be discussed below. Trade barriers can, for example, increase the costs of RES equipment which undermines cost competitiveness of RES, impose additional risks which may increase the cost of capital, and/or increase transaction costs.

3.4.2. Barriers to Trade in Goods

Liberal rules on trade in goods in the RES sector are of great importance due to the existence of GVC's. Barriers to trade in intermediate products in the RES sector are likely to increase the overall costs of RES generation equipment. In the context of GVC's, enacting trade barriers between jurisdictions can best be compared to enacting trade barriers within a single factory. Currently, applied tariffs on RES generation equipment are generally relatively low between developed States, below 10 percent.[69] Developing countries, on the other hand,

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& Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 10. Camilla Prawitz & Magnus Rentzhog, 'Making Green Trade Happen – Environmental Goods and Indispensable Services' (The National Board of Trade 2014). P. 17.

67. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). Pp. 8-9.
68. Ibid. P. 11.
69. H. Bucher, J. Drake-Brockman, A. Kasterine & M. Sugathan, *Trade in Environmental Goods and Services: Opportunities and Challenges* (International Trade Centre Technical Paper, 2014). P. 13. Veena Jha, 'Trade Flows, Barriers and Market Drivers in Renewable Energy Supply Goods: The Need to Level the Playing Field' (ICTSD issue Paper No. 10, 2009). Pp. 13-14.

often apply higher tariffs.[70] Although the average applied tariff in relation to RES goods is relatively low, two specific types of measures have regularly affected trade in the RES sector over the last years: LCR's and trade remedies. These measures have the ability to significantly alter flows of FDI in the RES sector: if certain markets are fended off by higher import duties or LCR's, foreign investors may want to establish a local presence in that jurisdiction, rather than import goods, in order to avoid these trade barriers.[71]

3.4.2.1. Local Content Requirements

LCR's require investors to source a specified amount of inputs in goods and services of a RES project locally. Due to the GVC's in the manufacturing process of RES generation equipment, LCR's 'have had a detrimental effect on global international investment flows in solar and wind energy' since they disrupt the value chain.[72] According to the OECD LCR's can, 'by raising the cost of inputs for downstream businesses […] hinder the profitability of downstream investors and lead to increased overall costs, weakened price competitiveness, reduced international investment flows and higher electricity prices.'[73] Therefore, international investors have held that LCR's are 'the main policy impediment to international investment across the solar and wind-energy value chain.'[74]

In a significant amount of States, LCR's are attached to RES support schemes.[75] Thus, depending on the (level of) local content of a given project, an investor may be eligible for (higher) financial support.[76] Arguments in favor of these

70. Id.
71. Veena Jha, 'Trade Flows, Barriers and Market Drivers in Renewable Energy Supply Goods: The Need to Level the Playing Field' (ICTSD issue Paper No. 10, 2009). P. 13.
72. OECD, *OECD Business and Finance Outlook 2016* (2016). P. 159. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and Investment* (2015). Pp. 59-60. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes - Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186.
73. OECD, *OECD Business and Finance Outlook 2016* (2016). P. 159.
74. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and Investment* (2015). P. 57. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes - Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186.
75. Jan-Christoph Kuntze & Tom Moerenhout, 'Local Content Requirements and the Renewable Energy Industry: A Good Match?' (ICTSD 2013). This study identified LCR's attached to FIT's in, amongst others: China, Canada, the US, Brazil, South Africa, Turkey, India and several EU Member States.
76. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes - Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 185.

requirements are the creation of a domestic RES industry and local jobs, and ensuring that tax payers' or electricity consumers' money – which is usually at stake in case of financial support to RES projects – is spend with maximum benefits for the host economy.[77]

Besides constituting barriers to trade, LCR's can also represent barriers to investment since they may significantly impact the costs and risks involved in RES projects at different stages of the project.[78] By forcing foreign investors to cooperate with local partners, it will be necessary to examine the creditworthiness of local project participants, contractors, and equity partners, which raises transaction costs.[79] In addition, LCR's can raise risks associated with construction, technology, planning, and design.[80] This is particularly the case when local partners and equipment lacks an established track record, which is important because of the high level of innovation in the RES sector.[81] These risks may also affect the operational and decommissioning phase of an investment.

As said, one way in which project developers of large RES projects often hedge risks associated with construction, operation, and technology is by requiring contractors or OEM's to take a minority share in the project.[82] In return of taking a minority share, contractors or OEM's will be awarded the contract to construct and operate the project or supply the required generation equipment. This increases the exposure of OEM's to aforementioned risks and thereby serves as a guarantee to the other partners that contractors or OEM's will perform according to the agreed arrangements.[83] Of course, when OEM's cannot supply parts to the project through their normal supply chain but, due to the LCR, they would be compelled to establish a local production facility, the LCR may function as an additional barrier to investment and trade.

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77. Id.
78. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 17.
79. John Dewar & Oliver Irwin, 'Project Risks' in John Dewar (ed.), *International Project Finance Law and Practice* (Oxford University Press 2015). Pp. 117-118.
80. Roger McCormiek, 'Project Finance' in Sarah Paterson *et al* (eds.), *The Law of International Finance* (Oxford University Press 2017). P. 791.
81. John Dewar & Oliver Irwin, 'Project Risks' in John Dewar (ed.), *International Project Finance Law and Practice* (Oxford University Press 2015). Pp. 88-90.
82. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 30.
83. Id.

Even when RES generation equipment is supplied by companies that are not an equity partner in the project, construction, operational, and technology risks are also expected to increase due to the LCR. Instead of working with the preferred companies that have proven track records, project developers may be compelled to cooperate with producers and contractors that lack such a record.[84] Thus, particularly projects in countries that lack knowledge and expertise in the RES sector can be affected by LCR's due to increased risks and transaction costs.

The financial consequences of LCR's can best be demonstrated by reference to a research conducted in the context of the LCR's maintained in the RES support schemes of the Canadian provinces Ontario and Quebec. It was found that the LCR raised the costs of installed wind capacity with approximately 'USD 386 per kilowatt of electricity' which amounted to 14 percent of the total costs per kilowatt of installed capacity.[85] This made Canadian wind energy significantly more expensive than wind turbine capacity in the US.[86] If one would translate these additional costs for a large wind farm of 600 MW, the total costs would increase by USD 231 mln.[87]

3.4.2.2. Trade Remedies

Trade remedies, such as anti-dumping or countervailing duties, are frequently applied in the RES sector.[88] In many States these measures have been adopted against (perceived) unfair trade practices, such as dumping and the (unfair) subsidization of domestic producers of RES generation equipment such as PV panels.[89] A relatively modest number of these cases were brought before the

84. Ibid. P. 31.
85. Gary Hufbauer & Jeffrey Schott, *Local Content Requirements – A Global Problem* (Peterson Institute for Economic Studies 2013). Pp. 71–73.
86. Id.
87. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 32.
88. H. Bucher, J. Drake-Brockman, A. Kasterine & M. Sugathan, *Trade in Environmental Goods and Services: Opportunities and Challenges* (International Trade Centre Technical Paper, 2014). P. 16. Tilak Doshi, *Sector Study on Environmental Services: Renewable Energy* (APEC Policy Support Unit, 2017). Pp. 30-31. Ricardo Meléndez-Ortiz & Mahesh Sugathan, 'Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – Synthesis of the Policy Options' [2017] 51 Journal of World Trade 933. P. 937. Christopher Frey, 'The Role of Mega-Regionals in the Decarbonization of the Economy' in Thilo Rensmann (ed.), *Mega-Regional Trade Agreements* (Springer 2017). P. 279.
89. Ricardo Meléndez-Ortiz & Mahesh Sugathan, 'Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – Synthesis of the

WTO Dispute Settlement Body, including some of the largest trade disputes in WTO history if calculated on the basis of the value of trade affected. For example, a dispute between the EU and China, affecting trade with an annual value of EUR 21 bln, arose in 2013 after the EU imposed tariffs on Chinese solar panels.[90] After China threatened to retaliate by imposing import duties on European wine and steel, the dispute was quickly settled between the parties in order to avoid a trade war.[91] A comparable dispute arose between the US and China in 2012 and it remains unresolved although it has been litigated to the very end at the WTO.[92]

The effects that trade remedies can have on investment and trade in the RES sector are significant: if the prices of generation equipment increase, demand for those products is expected to go down and investments are also expected to decrease as a result.[93] Given the increased costs of inputs, trade remedies can also result in higher LCOE thereby undermining the price competitiveness of RES. Arguments that are often relied upon to justify them include the protection of domestic industries and jobs against unfair foreign competition. Besides reducing demand for affected goods, trade remedies can also force manufacturers to relocate their production facilities. For example, OEM's may establish manufacturing facilities in the jurisdiction that is protected by the measure or – and this is more likely – relocate to a jurisdiction where labor costs are low and that are not targeted by the measures. In the past, Chinese manufacturers have, for example, relocated to other countries in South East Asia in order to avoid trade remedies in the US and the EU.[94]

Policy Options' [2017] 51 Journal of World Trade 933. P. 937.

90. Robin Emmott & Ben Blanchard, 'EU, China resolve solar dispute - their biggest trade row by far' (Reuters 2013).
91. Id.
92. *United States — Countervailing Duty Measures on Certain Products from China*, DS437.
93. Ricardo Meléndez-Ortiz & Mahesh Sugathan, 'Enabling the Energy Transition and Scale-Up of Clean Energy Technologies: Options for the Global Trade System – Synthesis of the Policy Options' [2017] 51 Journal of World Trade 933. P. 937.
94. Also, after trade remedies were imposed on Chinese solar panels and the Fukushima disaster in Japan, a shift in PV exports from China was noticeable: instead of Europe and the US, Japan became a major importer of Chinese cells: Joachim Monkelbaan, 'Using Trade for Achieving the SDGs: The Example of the Environmental Goods Agreement' [2017] 51 Journal of World Trade 575. P. 584. Christian Roselund, *Malaysia, Korea and Vietnam dominate U.S. solar imports* (PV-Magazine, 2018). Diala Hawila & Arslan Khalid, 'Renewable Energy Benefits – Leveraging Local Capacity for Solar PV' (IRENA 2017). P. 9.

3.4.3. Barriers to Trade in Services

Trade in services is also highly relevant for the development of RES projects. To illustrate, one can refer to offshore wind development and protectionist legislation in the maritime sector. In Europe, the offshore wind sector has become mature due to decades of experience and a large market for offshore wind projects, evidenced by the sheer amount of total offshore installed wind capacity: 18.5 GW.[95] To realize this growth and to meet the demand from the market, European companies engaged in offshore construction have developed a fleet of vessels that are capable of installing wind turbines offshore, so called jack-up vessels. In addition, these jack-up vessels are manned by crews specialized in this specific task. The participation of several of these maritime severices providers as equity partner in offshore wind farms shows that they are also becoming active as investors.

By comparison, in the US the first offshore wind farm has only been operational since December 2016 with a capacity of only 30 MW although ambitious plans are currently in the pipeline.[96] It is, therefore, perceivable that European offshore wind developers and maritime services companies have more experience in the construction, operation, and maintenance of offshore wind facilities. For the US, attracting European developers and services providers as investors in US offshore wind farms might be benificial since this would allow the US to reap the benefits of the experienced gained over the last decades in Europe. Likewise, for European companies the US may be an interesting unexplored market for offshore wind farm development with a lot of 'low hanging fruit', *i.e.* easy to develop projects.

However, US legislation may not allow European vessels and their crews to be involved in the construction, operation, and maintenance of US offshore wind farms.[97] On the basis of the Merchant Marine Act of 1920 and related legislation

95. See: Wind Europe, 'Offshore Wind in Europe – Key Trends and Statistics 2018' (WE, 2018). <https://windeurope.org/about-wind/statistics/offshore/european-offshore-wind-industry-key-trends-statistics-2018/> accessed on 11/02/2019.
96. Of course, the US did not ratify the ECT and is not bound by it. However, this example primarily serves to illustrate a barrier to trade and investment in the RES-sector. Cassius Shuman, 'Wind Farm Begins Commercial Operation' (*The Block Island Times*, 2016) <http://www.blockislandtimes.com/article/wind-farm-begins-commercial-operation/48318> accessed on 18/01/2017.
97. Charlie Papavizas, 'Working with the Jones Act in the Offshore Wind Industry' (*Offshore Wind Journal*, 2016). <http://www.owjonline.com/news/view,working-with-the-jones-act-in-the-offshore-wind-industry_45102.htm> accessed on 17/01/2017.

– often combinedly referred to as the 'Jones Act' – the US shipping industry is protected from foreign competition.[98] For example, the transport of goods and persons between US ports requires that ships are owned by US citizens for at least 75 percent.[99] Also, these vessels must be sailing under the US flag, be built in the US, and be manned by a US crew.[100] By virtue of the 1953 Outer Continental Shelf Lands Act, the application of the Jones Act extends 'to any man-made device permanently or temporarily affixed to the seabed […] out to 200 nautical miles from the coast.'[101] Although it is currently disputed to what extent these laws would be obstacles to the participation of foreign companies in US offshore wind farm development, the need for caution is clear and European vessels are therefore not being employed in the US.[102] This means that efficiency gains that have been made in Europe may not necessarily be applied in the US offshore sector.[103] A report found, for instance, that the Jones Act may 'may increase project costs by as much as USD 20-40 mln for a 100 turbine development.'[104] For example, research conducted for the US Department of

98. Merchant Marine Act of 1920, Public Law No. 66-261, 41 Stat. 988. Daniel Michaeli, 'Foreign Investment Restrictions in Coastwise Shipping: A Maritime Mess' [2014] 89 New York University Law Review 1047. P. 1054.
99. Daniel Michaeli, 'Foreign Investment Restrictions in Coastwise Shipping: A Maritime Mess' [2014] 89 New York University Law Review 1047. P. 1054.
100. Peter C. Evans, 'Strenghtening WTO Member Commitments in Energy Services: Problems and Prospects' in Pierre Sauve *et al* (eds.), *Domestic Regulation and Service Trade Liberalization* (World Bank Publications 2003). P. 175. Charlie Papavizas, 'Working with the Jones Act in the Offshore Wind Industry' (*Offshore Wind Journal*, 2016). <http://www.owjonline.com/news/view,working-with-the-jones-act-in-the-offshore-wind-industry_45102.htm > accessed on 17/01/2017. Douglas Burnett & Michael Hartman, 'The Jones Act – One More Variable in the Offshore Wind Equation' (*Squire Sanders*) <http://www.squirepattonboggs.com/~/media/files/insights/events/2010/09/offshore-wind-seminar/files/jones-act-paper/fileattachment/jones_actone_more_variable_in_the_offshore_equat__.pdf> accessed on 17/01/2017. P. 3.
101. Charlie Papavizas, 'Working with the Jones Act in the Offshore Wind Industry' (*Offshore Wind Journal*, 2016). <http://www.owjonline.com/news/view,working-with-the-jones-act-in-the-offshore-wind-industry_45102.htm > accessed on 17/01/2017.
102. Id. Douglas Burnett & Michael Hartman, 'The Jones Act – One More Variable in the Offshore Wind Equation' (*Squire Sanders*) < http://www.squirepattonboggs.com/~/media/files/insights/events/2010/09/offshore-wind-seminar/files/jones-act-paper/fileattachment/jones_actone_more_variable_in_the_offshore_equat__.pdf> accessed on 17/01/2017.
103. For example, when the Dutch maritime engineering company Van Oord constructed offshore wind turbines for the Gemini windfarm, it took them 24 hours to complete the first wind turbine while it only took 12 hours to complete the final turbine. This gain in efficiency was primarily due to the steep learning curve of the crew of Van Oord who had gained experience, competence, and skills in the construction of offshore wind turbines.
104. Douglas Westwood, 'Assessment of Vessel Requirements for the U.S. Offshore Wind Sector' (2013). P. 85. <https://www.energy.gov/sites/prod/files/2013/12/f5/assessment_vessel_requirements_US_offshore_wind_report.pdf> accessed on 11/02/2019.

Energy estimated that it would cost 60 to 200 percent more to built a Jones Act compliant vessel in the US than it would overseas.[105] Also, the fact that US offshore wind projects have to be developed by inexperienced contractors using untested American vessels and inexperienced crews may raise risks associated with such projects.

Although this example concerns trade in services under mode 1, and all modes of services supply are relevant for the development of RES projects, the remainder of this section will primarily highlight barriers associated with the modes of supply that are most relevant for the RES sector: modes 3 and 4.[106]

3.4.3.1. Supply of Services: Mode 3

Mode 3 of services supply, the establishment of a local commercial presence, is by far the most important mode of services supply for RES services.[107] Since the establishment of a local commercial presence by definition requires an investment it is closely linked to FDI.

However, it has been said that there are several reasons why foreign services suppliers cannot compete on a level playing field in various countries, 'many of which involve restrictions on foreign investment.'[108] Discriminatory barriers to FDI that RES service suppliers may encounter include: economic needs tests for the establishment of a commercial presence, foreign equity limits, nationality or residency requirements for accreditation of certain types of services, restrictions on the acquisition of land and real estate, and investment screening procedures.[109]

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105. Colin Grabow, Inu Manak, & Daniel J. Ikenson, 'The Jones Act: A Burden America Can No Longer Bear' (Cato Institute, Policy Analysis Nr. 845, 2018). P. 12. Available at: <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa845.pdf> accessed on 11/02/2019.
106. Markus Krajewski, 'Liberalizing Trade in Energy Services and Domestic Regulation: New Approaches in Mega-Regionals?' in Thilo Rensmann (ed.), *Mega-Regional Trade Agreements* (Springer 2017). P. 301.
107. United States International Trade Commission, *Renewable Energy and Related Services: Recent Developments* (Investigation No. 332-534, August 2013). P. 2-19. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 10. Camilla Prawitz & Magnus Rentzhog, 'Making Green Trade Happen – Environmental Goods and Indispensable Services' (The National Board of Trade 2014). P. 17.
108. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 10.
109. Ibid. P. 11.

This means that while mode 3, which is intrinsically linked with FDI, is the most important mode of services supply in the RES sector, barriers to investment and trade in this area are manifold. From a development perspective, this may be undesirable. Currently, much of the RES technology and knowledge is in the hands of a relatively select groups of companies, primarily located in developed countries and China. However, when subsidiaries of multinational firms establish a local presence in a country they often rely on local labor markets for personnel.[110] This means that there are ample opportunities for local job creation, transfer of skills and knowledge, and local partnerships.[111]

3.4.3.2. Supply of Services: Mode 4

Mode 4 of services supply, the presence of natural persons, merely accounts for 5 percent of the value of all services traded internationally.[112] Nevertheless, its share of services supply in the RES sector is likely much higher since it is not uncommon that a foreign company which provides services through mode 3 also provides accompanying services through mode 4, especially when supervision or inspection is required for a short period of time.[113]

In particular in relation to countries that lack a mature RES services market, obstacles to the movement of people can be a significant impediment to trade in services.[114] Common barriers include: labor-market tests, limitations on the duration of stay of foreign personnel, and cumbersome and complex visa procedures.[115]

Given the fact that mode 4 of services supply involves the movement of natural persons across borders, it is also the most controversial mode of supply since it relates to issues of migration and labor policy.

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110. Id.
111. Ibid. P. 27.
112. Rainer Lanz & Andreas Maurer, 'Services and Global Value Chains – Some Evidence on Servicification of Manufacturing and Services Networks' (WTO Working Paper No. ERSD-2015-03 2015). P. 13.
113. Ronald Steenblik & Massimo Geloso Grosso, 'Trade in Services Related to Climate Change: An Exploratory Analysis' (OECD, 2011). Pp. 4 & 10.
114. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 11. Camilla Prawitz & Magnus Rentzhog, 'Making Green Trade Happen – Environmental Goods and Indispensable Services' (The National Board of Trade 2014). P. 17.
115. Id.

3.4.4. Linkages between the ECT Investment Chapter and Trade in Goods and Services

Besides the close factual relationship between investment and trade in the RES sector, there are also various legal connections between the two in the investment chapter of the ECT.

Concerning trade in goods, Art. 5 ECT contains a provision on trade-related investment measures (TRIM). Although this article can be found in Part II of the ECT on 'Commerce', Art. 10(11) ECT, which is located in Part III 'Investment Promotion and Protection', in essence incorporates Art. 5 into Part III by reference. On the basis of this provision, ECT contracting parties may not apply TRIM's, such as LCR's, to investments of investors of other contracting parties existing at the time of such application. There is currently no link between import duties and trade remedies and the investment chapter.

Concerning trade in services, it has already been mentioned that establishing a commercial presence under mode 3 by definition requires an investment. As such, market access is a relevant aspect. Currently, Arts. 10(2)(3)(5)(6) ECT do not provide for any binding commitments on market access for investors. Hence, the ECT currently does not liberalize FDI. That liberalizing services under mode 3 and market access for investors are closely related can be demonstrated by reference to CETA, where services under mode 3 is regulated through the investment chapter, which also contains rules on investment protection.[116]

Services supply under mode 4 relates to some extent to Art. 11 ECT on key personnel. Although the commitments undertaken on the basis of Art. 11 do not provide for market access of foreign personnel, it does recognize the importance to move personnel into the host State by foreign investors, including personnel engaged in 'key technical services'.[117]

116. Panagiotis Delimatsis, 'The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit' [2017] 20 Journal of International Economic Law 583. P. 595. Articles 8.4-8.5, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
117. Article 11(1), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).

3.5. POLITICAL AND REGULATORY RISKS IN THE RENEWABLE ENERGY SECTOR: THE CASE OF SPAIN

In the previous chapter it was argued that political and regulatory risks can have a significant impact on the costs of the capital and the inflow of FDI. Although RES are increasingly becoming price competitive with conventional energy sources, in the past many (if not all) RES investment relied financial and regulatory support for their economic viability. This also means that these investments are exposed to a particular kind of regulatory risk, namely that the support will be altered or withdrawn during the lifetime of a project. Since RES projects are often heavily financed with debt, a decrease in financial support can have significant effects on the cash flow and leave an investment insolvent.[118]

That this risk is not merely hypothetical is evidenced by the current list of ECT disputes. In particular over the last decade, many ECT disputes relate to RES where the reduction of financial support is at the heart of the dispute. States like Greece, Bulgaria, Italy, the Czech Republic, and Spain are all respondent in ECT ISDS cases because of this reason.[119] As illustration, the regulatory changes to the Spanish RES support scheme will be introduced here.[120]

3.5.1. Developments in Spanish Renewable Energy Laws and Regulations

The 'boom' in the Spanish RES sector, that would subsequently be followed by a 'bust', began over a decade ago.[121] In 2007, the country adopted a generous

118. IRENA & CPI, 'Global Landscape of Renewable Energy Finance' (2018). P. 12. <https://irena.org/-/media/Files/IRENA/Agency/Publication/2018/Jan/IRENA_Global_landscape_RE_finance_2018.pdf > accessed on 31/01/2019.
119. Norah Gallagher, 'ECT and Renewable Energy Disputes' in Maxi Scherer (ed.), *International Arbitration in the Energy Sector* (Oxford University Press 2018). P. 250.
120. The remainder of this chapter draws from various articles co-written by the present author: Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Cees Verburg & Nikos Lavranos, 'Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the *Achmea* Judgment for Intra-EU ECT Arbitrations' [2018] 3 European Investment Law and Arbitration Review 197. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1.
121. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Pp. 68-69.

legal framework that foresaw in direct financial support in the form of FIT's through Royal Decree 661/2007 (RD 661/2007). This support would span the entire lifetime of the project, although the FIT was reduced after a number of years.[122] Although RD 661/2007 did allow for future tariff adjustments, these would not affect existing investments.[123] In line with EU law, RES projects would also enjoy priority dispatch. Eligibility for support under RD 661/2007 was contingent upon registration in a public registry within a specified timeline.

RD 661/2007 attracted a lot of RES investments: as much as 50 percent of all PV investments worldwide were made in Spain in 2008.[124] This 'success' may arguably be attributed to the generosity of the framework, about which concerns had already been raised in 2007. As one author put it, RD 661/2007 'guarantees very attractive profitability levels for [RES] investors. Furthermore, it will continue to be provided even when [RES] plants are fully paid-off, which will entail an unnecessary burden for consumers.'[125] For example, facilities with an output equal to or exceeding 100 KW would receive EUR 0,44 per KW/h for the first 25 years and EUR 0,35 per KW/h thereafter.[126]

Due to the fact that the electricity tariff for consumers was regulated in Spain at the time, the distribution system operators – which were in charge of paying the

Cees Verburg & Nikos Lavranos, 'Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the *Achmea* Judgment for Intra-EU ECT Arbitrations' [2018] 3 European Investment Law and Arbitration Review 197. Pp. 198-200. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. Pp. 10-13.

122. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). P. 68. Cees Verburg & Nikos Lavranos, 'Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the *Achmea* Judgment for Intra-EU ECT Arbitrations' [2018] 3 European Investment Law and Arbitration Review 197. P. 199. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 10.
123. Article 44(3), Royal Decree 661/2007, Legislation Development of the Spanish Electric Power Act, Volume 11, 2009. P. 117.
124. Daniel Behn & Ole Kristian Fauchald, 'Governments Under Cross-Fire? Renewable Energy and International Economic Tribunals' [2015] 12(2) Manchester Journal of International Economic Law 117. P. 121.
125. Pablo del Río González, 'Ten Years of Renewable Electricity Policies in Spain: An Analysis of Successive Feed-in Tariff Reforms' [2008] 36(8) Energy Policy 2917. P. 2926.
126. See for example: Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 121.

FIT's to generators, were not able to pass the costs of the subsidies on to the consumers, which created a so-called 'tariff deficit'.[127] It has to be noted that the FIT's were not the only cause of this deficit, they did however, in combination with the subsequent financial and economic crises, further exacerbate the problem.[128] Rating agency Moody's estimated that the cumulative amount of the deficit amounted to EUR 28.8 bln in 2013.[129]

In late 2007 Spanish authorities were already aware of the rapidly increasing investments in the RES sector.[130] Therefore, after the 'boom' had set in, and the authorities became aware of the fact that the support scheme might not be financially sustainable, various legislative measures were adopted with the object and purpose of reducing financial support.

Between 2008 and 2012 numerous measures were adopted that adjusted the existing legal regime. For example, in 2008 a Royal Decree was adopted that reduced support for new plants.[131] In 2010 a Royal Decree was adopted that eliminated the FIT from the 25th year onwards.[132] In the same year a Royal Decree Law was adopted that limited the amount of hours that a facility was eligible for the FIT while producing electricity and introduced a tariff for access to the electricity network.[133] In 2012, a 7 percent tax was introduced on all generators of electricity, including those that made use of RES.[134] These measures all adjusted the existing legal framework.

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127. Iñigo del Guayo Castiella, 'Promotion of Renewable Energy Sources by Regions: The Case of the Spanish Autonomous Communities' in Marjan Peeters *et al* (eds.), *Renewable Energy Law in the EU – Legal Perspectives on Bottom-Up Approaches* (Edward Elgar Publishing 2014). P. 67.
128. Iñigo del Guayo, 'Energy Law in Spain' in Martha Roggenkamp *et al* (eds.), Energy Law in Europe – National, EU and International Regulation (Oxford University Press 2016). P. 1041.
129. Global Credit Research, 'Moody's: Spanish Electricity System Heads Toward Sustainability, as Electricity Tariff Deficit Debt Falls' (Moody's 2016). <https://www.moodys.com/research/Moodys-Spanish-electricity-system-heads-toward-sustainability-as-electricity-tariff--PR_345353> accessed 13/11/2017.
130. Daniel Behn & Ole Kristian Fauchald, 'Governments Under Cross-Fire? Renewable Energy and International Economic Tribunals' [2015] 12(2) Manchester Journal of International Economic Law 117. P. 121.
131. Royal Decree 1578/2008. Pablo del Río González, 'Ten Years of Renewable Electricity Policies in Spain: An Analysis of Successive Feed-in Tariff Reforms' [2008] 36(8) Energy Policy 2917. P. 2919.
132. Article 3, Royal Decree 1565/2010, Boletin Oficial del Estado, nr. 283, 2010. P. 97428.
133. Royal Decree Law 14/2010 and Article 2 First Transitory Provision, Royal Decree Law 14/2010, Boletin Oficial del Estado, nr. 312, 2010. P. 106386.
134. Article 8, Law 15/2012, Boletin Oficial del Estado, nr. 312, 2012. P. 88081.

More draconic measures followed in the period 2013-2014, as the previous measures did not sufficiently address the financial concerns. In essence, the entire legal regime on the basis of which the support was granted was repealed.[135] In 2014 a new regime was introduced and subsequently applied to existing investments.[136] The parameters used by the new regime to calculate remuneration for RES plants were based on assumptions, rather than the actual characteristics of production plants.[137] The ECT tribunal in *Eiser v. Spain* summarized the new regime as follows:

> "The tariff regime in RD 661/2007 is abandoned, substituting a new regime of reduced remuneration based on hypothetical "standard" investment and operating costs and characteristics of hypothetical "efficient" plants, with remuneration limited to an operating life of 25 years. Remuneration is calculated based on regulators' projections of the revenues required to attain a prescribed lifetime pre-tax return of 7,398% based on the hypothetical costs of a hypothetical standard installation. The prescribed rate of return is potentially subject to change every six years. Remuneration is based on capacity, not production, eliminating the incentive potentially available under RD 661/2007 to build more expensive but more productive plants. Remuneration is capped at the hypothetical

135. See footnote 50, Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 12: "First, Royal Decree Law 2/2013 (RDL 2/2013) eliminated the option of a FIP and also changed the mechanism that was used to update FITs. Several months later, Royal Decree Law 9/2013 (RDL 9/2013) was adopted, which amended the provision of the Law of the Electricity Sector of 1997 (LES 1997) that had laid the legal foundation for the creation of the 'Special Regime' on the basis of which the later support schemes were based. Also, RD 661/2007 was repealed and the system of FITs and FIPs was eliminated and replaced by a system that provided 'for 'specific remuneration' based on 'standard' (but not actual) costs per unit of installed power, plus standard amounts for operating costs. Law 24/2013, which was adopted in late 2013 superseded the LES 1997 and 'completely eliminated the distinction between the Ordinary and Special Regimes. See: Article 1, Royal Decree Law 2/2013. Article 1, Royal Decree Law 9/2013, Boletin Oficial del Estado, nr. 167, 2013. P. 52106. Article 9 Single Derogatory Provision, Royal Decree Law 9/2013, Boletin Oficial del Estado, nr. 167, 2013. P. 52106. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Paras. 145-146."
136. Article 11, Royal Decree 413/2014, Boletin Oficial del Estado, nr. 140, 2014. P. 43876. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 147.
137. Ministerial Order IET/1045/2014 even explicitly uses the word 'assumptions': see Annex III, Ministerial Order IET/1045/2014, Boletin Oficial del Estado, nr. 150, 2014. P. 46430.

> production of a "standard plant." Payments already received by a facility under the prior regime can be credited against the lifetime remuneration due under the new one, thus allowing clawback of "excess" amounts received under the prior regime."[138]

For investments that deviated from the hypothetical standard used to calculate remuneration, the financial consequences could be severe. In the *Eiser v. Spain* case, for example, the cash flow of the investors dried up by as much as 66 percent, reducing the value of the investment to EUR 4 mln, while the investor had invested nearly EUR 125 mln.[139]

3.6. Conclusion

The second sub-question can now be answered. This question reads:

> 'How does the current RES sector operate: who are the investors, how is the sector organized, and to what extend are investments cross-border? What are existing barriers to investment and trade in the RES sector and how do they affect investors/investments?'

From the analysis of the energy sector conducted in this chapter, the following points emerge:

- The electricity sector is currently still largely organized along typical lines where production takes place at the top and through transmission- and distribution grids, the electricity is consumed at the bottom. It has to be noted, however, that this model is coming under pressure in the energy transition where more and more production of electricity takes place at the bottom of the energy chain as well.

- A wide variety of investors is active in the RES sector, ranging from typical (inter)national electricity production and/or supply companies, to OEM's of generation equipment and relevant services suppliers. Also, institutional investors from the financial sector are increasingly active in the sector. All of these parties have different

138. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 148. Formatting altered.
139. Ibid. Paras. 151-154.

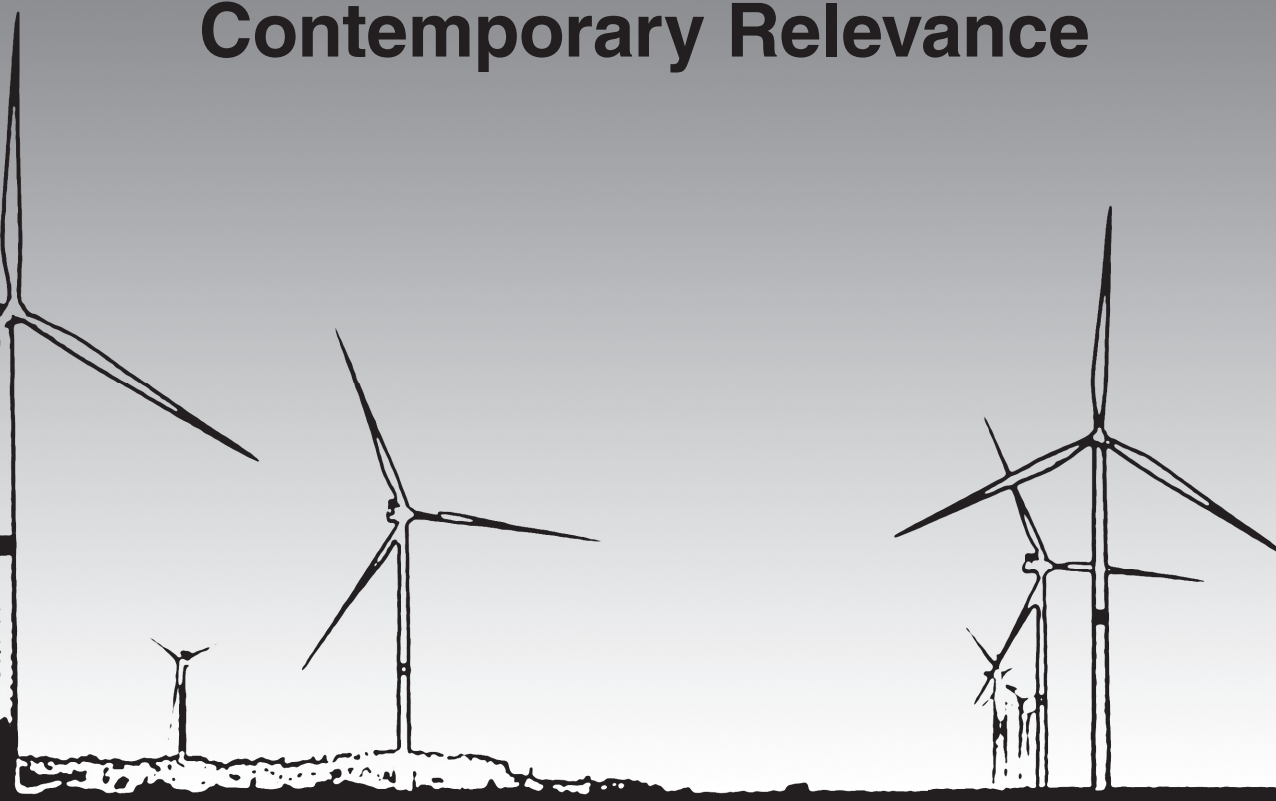
investment motives and strategies. Some invest early on with the purpose of divesting once the project is completed while others enter only after projects have become operational with the purpose of staying on for the long term.

· One could say that RES investments, even if they are completely domestically financed, still have important cross-border components. The value chain of RES generation equipment is increasingly globally organized which means that inputs from various jurisdictions are involved in the development of a domestically financed RES project. This also means that trade and investment barriers, such as LCRs, import tariffs, and other measures affecting the ability of firms to invest abroad and/or supply relevant goods and services, can significantly affect the LCOE of RES projects.

· Besides the already mentioned trade and investment barriers, an important general issue that is taken into account by investors in any investment decision is the potential political and regulatory risk that the investment will be exposed to. As demonstrated by the Spanish example, these risks can be very significant. It is thus important to maintain investor confidence since private investors are responsible for the lion's share of investments required for the energy transition.

CHAPTER 4.

The Energy Charter Treaty – Origin and Contemporary Relevance



4. THE ENERGY CHARTER TREATY – ORIGIN AND CONTEMPORARY RELEVANCE

The origins of the ECT date back to the early 1990's and are more related to fossil fuels than RES. In the early 1990's many politicians were struggling with the (future) relationship between Western Europe and Eastern Europe, where Communist regimes were crumbling after the Iron Curtain had lifted. Dutch Prime Minister Ruud Lubbers proposed a 'European Energy Community' that should create a win-win situation for all countries involved.[1]

For Western European countries, the creation of a legal framework that could facilitate trade and investment in the energy sector with the East would provide several opportunities. Firstly, the ECT might secure access to the vast oil and gas resources of the former USSR which, in the light of the political instability in the Middle East at the time, was considered to be of profound importance.[2] More broadly, it provided Western companies with the chance of obtaining access to energy markets in Eastern Europe.[3] The nuclear energy industry, for example, hoped that the ECT would provide them with the opportunity to retrofit Soviet-era nuclear power plants in accordance with Western safety standards.[4]

The ECT would also accrue benefits for Eastern European countries. In the early 1990's, these countries were heavily dependent on Russia for their oil and gas imports, as well as nuclear expertise. Enhanced relationships with the West could reduce their dependency on Russia.[5] In addition, the ECT would provide the former Soviet Republics in Central Asia with the opportunity to develop their oil- and gas industries and fully exploit their potential to become energy exporters.[6]

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1. Ruud Lubbers, 'Foreword' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. xiii.
2. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 138-139. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015). P. 114. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 241-242. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). Pp. 106-107.
3. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 138-139.
4. Id.
5. Id. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 241-242.
6. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy*

At the time this was seen as a precondition to become genuinely independent from Russia.[7] The main interest of the Russian Federation was access to Western capital and technology which could revitalize its oil- and gas industries and secure a stable export destination that would supply the Russian economy with Western currencies.[8] With regards to all former Communist countries, the hope was that the ECT would support the transition to market economies, an ambition wholeheartedly supported by Western States.[9]

To fully exploit this potential win-win situation; three elements were of pivotal importance. First of all, rules regarding trade had to be laid down since many of the former Communist countries had never participated in the multilateral trade regime that was established by the General Agreement on Tariffs and Trade of 1947 (GATT 1947). Secondly, to carry the natural resources from the plains of Central Asia and Siberia to Europe several national borders had to be crossed. Therefore, rules on transit had to be laid down to secure unhindered flows of oil and gas.[10] Finally, since the legal framework in the former Communist block exposed Western investors to significant investment risks, international rules on investment protection had to be established as well as an efficient dispute settlement mechanism to enforce these rules.[11] The final ECT text would eventually contain obligations addressing all of these concerns.[12]

In December 1991 the European Energy Charter (EEC) would be adopted, a legally non-binding political declaration by which the signatories committed themselves to promoting access to energy markets, capital markets and liberalizing trade in energy.[13] At the same time, the EEC also stressed the importance of environmental protection and the mitigation of environmental

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Charter Treaty – An East-West Gateway for Investment & Trade (Kluwer Law International 1996). Pp. 138-139.

7. Id.
8. Id. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015). P. 114.
9. Ruud Lubbers, 'Foreword' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. xiii.
10. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 241.
11. Id.
12. Part II of the ECT contains rules regarding trade and transit while investment rules is provided for in Part III of the treaty. In addition, rules on dispute settlement can be found in Part V.
13. Title I, European Energy Charter (adopted 17/12/1991).

degradation.[14] Furthermore, the EEC contained the ambition to conclude a binding treaty, which would eventually lead to the conclusion of the ECT three years later. It has to be noted that non-European members of the OECD such as the US, Canada, Japan, Australia, and New Zealand also participated in the negotiations of the EEC and the ECT.[15] In that regard, the 'Energy Charter Process' was from the very beginning more than merely a European project. Their motives were comparable to West-European States, *i.e.* to secure access to the promising energy markets in the former USSR. The US in particular was concerned that these markets would be monopolized by European companies.[16]

From the above it is clear that the initial ambitions of the ECT were primarily related to the upstream oil, gas, and electricity sectors. Nevertheless, the text is drafted broad enough to include RES as well. For example, where ECT trade provisions initially only covered trade in 'energy materials and products', by virtue of the 1998 Trade Amendment, the scope was expended to 'energy related equipment', which includes heat pumps and electrical generation devises.[17] The transit provision contains obligations with regards to the transit of 'energy materials and products', which includes electrical energy – potentially electricity generated by RES.[18] Finally, the investment chapter applies to investments 'associated with an economic activity in the energy sector', which on the basis of the definition provided for by the treaty, is broad enough to cover RES investments.[19] The ECT therefore covers RES. One could consider this to be an advantage, after all negotiating trade and investment agreements may take many years – if not decades. If we can make use of an already existing legal framework to facilitate trade, transit, and investments in RES this could accelerate and facilitate a transition to a more decarbonized energy society. This especially holds true in a time where protectionism and economic nationalism seem to be on the rise and the conclusion of comprehensive trade and investment agreements seems increasingly challenging.

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14. Id.
15. Note: From all of these States, Japan is the only one that actually ratified the ECT.
16. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 9.
17. Articles 29 & 31 and Annex EQ I (Ex 84.18 and 85.02), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
18. Ibid. Article 7(1) and Annex EM.
19. See Article 1(5) ECT. An economic activity in the energy sector is defined as follows: 'an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of energy materials and products'.

In order to elaborate on the potential of the ECT in its entirety to govern RES, this chapter will briefly introduce the ECT and analyze how its legal framework may affect trade, transit, and investments in the RES sector. Therefore, the ECT's trade and transit obligations will be examined first and it will be explained how these may be relevant for facilitating the integration of RES. Since this dissertation specifically concerns investment promotion and protection, this chapter will briefly introduce some of the definitions that define the scope of the ECT's investment chapter, namely those of 'investment', 'investor', and 'economic activity in the energy sector.' The substantive obligations of Part III of the Treaty will be examined in subsequent chapters.

4.1. TRADE

The ambition of the ECT regarding trade is expressed in Art. 3: "The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products and Energy-Related Equipment." To realize this aim, the ECT incorporates the provisions of GATT 1947 and those of GATT 1994 for countries that were to become a Member of the WTO.[20] One should recall that for a period of time, the negotiations of the ECT and the WTO Agreements took place simultaneously and were even linked by some delegations.[21] To ensure that there would be no conflict between the ECT and the WTO Agreements, Art. 4 ECT emphasizes that the ECT does not derogate from the WTO Agreements for trade between WTO Members. In addition, incorporating the GATT regime into the ECT would provide the former Communist countries with the opportunity to implement GATT rules which would prepare them for full WTO membership.[22] During the ECT negotiations this meant that Western delegations and members of the ECT Secretariat had to spent a significant amount of time on explaining the concepts of trade rules to the delegations of several former Communist States, many of which had no earlier experience with the GATT.[23]

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20. Articles 3 & 29, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
21. Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 144-145.
22. Mary E. Footer, 'Trade and Investment Measures in the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 445-446.
23. Some countries behind the 'Iron Curtain', such as Poland and Romania, had participated in GATT 1947 long before the 1990's. Julia Doré, 'Negotiating the Energy Charter Treaty' in

The legal regime that applied to trade depended on whether the countries involved in the trade were party to GATT 1947, GATT 1994 or neither.[24] Due to this complexity, the ECT's trade regime has been referred to as a 'labyrinth'.[25] This labyrinth will not be explained in-depth however, since an overwhelming majority of ECT contracting parties, including the Russian Federation, the Ukraine, and Kazakhstan, has become a member to the WTO. Therefore, trade between most ECT contracting parties is governed by the WTO Agreements due to Art. 4 ECT. Hence, the relevance of the ECT as a trade agreement has diminished significantly.[26]

Initially, the trade regime only applied to trade in 'energy materials and products' although this has been extended to 'energy related equipment' by virtue of the 1998 ECT Trade Amendment that entered into force in 2010. The sole emphasis of the ECT's trade regime on trade in goods can be considered as a shortcoming since services are therefore not covered by the arrangement. RES services are, however, of profound importance for the energy transition.[27] In fact, it has been said that 'the size of sustainable energy services is bigger than the market for related goods.'[28]

To conclude, in the 1990's, the ECT's trade provisions were of great importance since they applied the GATT regime to many countries that had no earlier experience with these rules. By doing so, the ECT arguably contributed to the integration of many former Communist countries into the world economy even before these countries acquired WTO membership. However, the ECT's trade rules have lost significance since nearly the entire ECT constituency is now

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Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 146. Andrew Ian Douglas, 'East-West Trade: The Accession of Poland to the GATT' [1972] 24 Stanford Law Review 748.

24. Olivia Q. Swaak-Goldman, 'The Energy Charter Treaty and Trade – A Guide to the Labyrinth' [2007] 90 Journal of World Trade 115.
25. Id.
26. At present, only Azerbaijan, Bosnia and Herzegovina, Uzbekistan, Turkmenistan, and Belarus are ECT contracting parties that have not acquired WTO membership.
27. Thomas Cottier, 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?' [2014] 5 Renewable Energy Law & Policy 40. P. 45. Joachim Monkelbaan, 'Trade in Sustainable Energy Services' (*International Centre for Trade and Sustainable Development*, October 2013). <http://www.ictsd.org/downloads/2013/10/trade-in-sustainble-energy-services.pdf> accessed on 01/11/2016. Pp. 1 & 10.
28. Joachim Monkelbaan, 'Trade in Sustainable Energy Services' (*International Centre for Trade and Sustainable Development*, October 2013). <http://www.ictsd.org/downloads/2013/10/trade-in-sustainble-energy-services.pdf> accessed on 01/11/2016. P. vii.

a WTO member. At the same time, however, one could argue that the WTO Agreements are also losing their relevance since the WTO has not been able to deliver new trade agreements since its inception in 1995 with the exception of one agreement addressing trade facilitation. Consequently, States are increasingly concluding FTA's outside the auspices of the WTO, which means that growing amounts of world trade are no longer governed by the WTO Agreements but by FTA's. Also, the fact that the ECT's trade provisions exclusively govern trade in goods, thereby neglecting services, can be considered as a shortcoming with regards to RES since services are of great importance during all stages of a RES project.[29]

4.2. TRANSIT

Transit is addressed in Art. 7 ECT and is defined as the carriage of energy materials and products across at least two borders.[30] Thus, it can include transport originating in State A through State B into State C, or the carriage can originate in State A through State B to another part of State A.[31] Perhaps the most important obligation of Art. 7 ECT is laid down in paragraph 6 and prescribes that the transit State shall not interrupt or reduce the flow of existing energy materials and products in cases of conflict prior to the conclusion of the dispute resolution procedure as laid down in Art. 7(7) ECT. This is clearly advantageous for the energy consuming States involved, but for the transit State this means that it cannot exploit its leverage of cutting off supplies during disputes without violating its international obligations.[32] Furthermore, Art. 7 ECT prescribes that the transit has to take place on a non-discriminatory basis although there is no obligation to provide mandatory third-party access.[33]

29. Markus Krajewski, 'Liberalizing Trade in Energy Services and Domestic Regulation: New Approaches in Mega-Regionals?' in Thilo Rensmann (ed.), *Mega-Regional Trade Agreements* (Springer 2017). P. 310.
30. Article 7, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
31. Catalin Gabriel Stanescu, 'Article 7 – Transit' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). Pp. 98-99.
32. Peter D. Cameron, 'The Energy Charter Treaty and East-West Transit' in Graham Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (JurisNet 2011). P. 307.
33. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 16. Martha M. Roggenkamp, 'Transit of Network-bound Energy: The European Experience' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 511.

Over the last two decades several transit disputes have occurred, most notably – but not exclusively – involving the carriage of Russian gas through the Ukraine to the EU.[34] Because Art. 7 ECT has failed to prevent or mitigate these disputes, it has attracted criticism.[35] One of the perceived shortcomings, for example, is the fact that Art. 7 ECT only creates obligations for contracting parties or entities under the control of a contracting party, but not for private companies.[36] Moreover, in comparison to Art. V GATT, the ECT's transit provision seems to put more emphasis on territorial sovereignty whereas the GATT places more emphasis on the principle of the freedom of transit.[37] Regarding dispute settlement, perceived shortcomings are that dispute settlement procedures may last longer than the actual conflict, which would mean that any verdict is merely declaratory in effect.[38] In order to address these shortcomings, negotiations have been held in order to conclude a Transit Protocol but these negotiations have failed to materialize in a binding Protocol.[39]

In relation to RES, Art. 7 ECT does not specifically incorporate nor exclude RES. However, since it applies to 'energy materials and products', this includes

34. Transit disputes include: the 2002 Croatia-Slovenia oil transit dispute, the 2008 transit dispute concerning the carriage of Russian gas to Armenia through Georgia during the 2008 Russia-Georgia armed conflict, the 2008 disruption of gas deliveries to South-Ossetia, the 2009 Ukraine-Russia gas transit dispute, the 2010 Belarus-Russia gas transit dispute. See: Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (Oxford University Press 2015). Pp. 89-94.
35. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 16. Beatriz Huarte Melgar, *The Transit of Goods in Public International Law* (Brill Nijhoff 2015). P. 229.
36. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 16. It has to be noted that this argument can be rebutted since Art. 7(6) speaks of entities subject to its control or jurisdiction. See: Catalin Gabriel Stanescu, 'Article 7 – Transit' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 107.
37. Martha M. Roggenkamp, 'Transit of Network-bound Energy: The European Experience' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 509.
38. Colin M. Brown, 'Transit Disputes, Supply Disputes and the ECT: Towards an East-West Thaw? Some Observations from an International Trade Law Perspective' in Graham Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (JurisNet 2011). Pp. 293-294. Peter D. Cameron, 'The Energy Charter Treaty and East-West Transit' in Graham Coop (ed.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (JurisNet 2011). Pp. 305-306.
39. Danae Azaria, 'Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade' [2009] 27 Journal of Energy & Natural Resources Law 559. P. 563. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 17. Beatriz Huarte Melgar, *The Transit of Goods in Public International Law* (Brill Nijhoff 2015). P. 229.

electrical energy. Since much of the renewable energy is actually electricity; Art. 7 ECT covers the transit of electricity generated by RES.[40]

4.3. INVESTMENT: OBJECT, PURPOSE, AND SCOPE OF THE INVESTMENT CHAPTER

Due to its frequent invocation in practice, the ECT's investment promotion and protection chapter, which can be found in Part III of the treaty, is probably the most relevant part of the ECT.

Part III contains first and foremost substantive investment protection standards that protect investors against, amongst others, discrimination, expropriation without compensation, and unreasonable treatment. These investment protection standards protect foreign investors against political and regulatory risk in a manner that is comparable to administrative law or human rights, by prescribing the rule of law.[41] Through Art. 26 ECT, which is located in Part V of the treaty, investors can enforce these provisions and obtain damages if a State has failed to comply with its obligations under Part III of the Treaty. That the investment protection standards of the ECT are highly relevant in practice is evidenced by the number of investor-State disputes that has arisen under the treaty: there are currently more than 120 known cases.[42] To put this number in perspective, there are currently approximately 3200 IIA's and the total number of investor-State disputes that has arisen under all of these treaties amounts to approximately 950 in total, which makes the ECT the most often invoked IIA in existence.[43] In fact,

40. Beatriz Huarte Melgar, *The Transit of Goods in Public International Law* (Brill Nijhoff 2015). Pp. 229-231.
41. Susan Karamanian, 'Human Rights Dimensions in Investment Law' in Erika de Wet *et al* (eds.), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012). Pp. 236-271. Chester Brown, 'Investment Treaty Tribunals and Human Rights Courts: Competitors or Collaborators?' [2016] 15(2) The Law and Practice of International Courts and Tribunals 287. Daniel Kalderimis, 'Investment Treaty Arbitration as Global Administrative Law: What this Might Mean in Practice' in Chester Brown *et al* (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011). Pp. 145-159. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. Pp. 6-7.
42. For an overview of all investor-State ECT disputes, see: <https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/>
43. For statistics on IIA's and investment dispute settlement, see: <https://investmentpolicyhub.unctad.org/>

the energy sector in general is overrepresented in investor-State disputes, which evidences the importance of investment protection in this sector.[44]

At the time of conclusion, the investment protection standards were considered of great importance because the perception was that the newly independent States that used to comprise the USSR did not have the 'adequate legal infrastructure for the protection' of investments made by Western investors.[45] By providing protection against undue government interference of an investment IIA's could contribute to flows of FDI: mitigating risks associated with an investment may make an investment attractive to a larger pool of investors while at the same time reducing the cost of capital because risk premiums are reduced.[46] As said, investments in the RES sector are at present largely regulatory driven, meaning that investments are most likely to occur in jurisdictions where favorable investment incentives are in place, RES investments are exposed to a specific regulatory risk, namely that regulatory frameworks governing RES production will be changed with unfavorable effects for investors.[47] Practice under the ECT demonstrates that these risks are not merely hypothetical since a very significant number of ECT cases relates to regulatory changes experienced by RES investors.[48]

Besides promoting investment by protecting it, the ECT's investment chapter also contains specific provisions that may promote investment by 'permitting,

44. Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). Pp. 145-146. Maxi Scherer, 'Introduction' in Maxi Scherer (ed.), *International Arbitration in the Energy Sector* (Oxford University Press 2018). Pp. 1-2.
45. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 241.
46. Shannon Pratt & Roger Grabowski, 'Relationship Between Risk and the Cost of Capital' in Shannon Pratt *et al* (eds.), *Cost of Capital: Applications and Examples* (Wiley 2014). Pp. 70–87; René M. Stultz, 'Globalization, Corporate Finance, and the Cost of Capital' [1999] 12(3) Journal of Applied Corporate Finance 8. Pp. 8–25.
47. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. Pp. 4-9. Petri Mäntysaari, *EU Electricity Trade Law – The Legal Tools of Electricity Producers in the Internal Electricity Market* (Springer 2015). P. 149. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Yulia Selivanova, 'Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases' [2018] 33(2) ICSID Review – Foreign Investment Law Journal 433.
48. Id.

attracting, and facilitating' FDI.[49] During the ECT negotiations, for example, much of the debate over Art. 10 ECT related to investment liberalization by providing market access to foreign investors on a non-discriminatory basis.[50] As will be explained in more depth in chapter 6, the ECT currently does not provide for binding market access commitments and, therefore, does not actively contribute to the liberalization of FDI by reducing or eliminating discriminatory barriers.[51] This means that the primary – if not sole – way in which the ECT can contribute to increased flows of FDI in the RES sector has to come from its investment protection standards. However, a recent meta-analysis shows that investment treaties that merely provide for post-establishment investment protection probably only have a marginal effect on flows of FDI.[52] One of the main points of this dissertation will therefore be that by providing for binding non-discriminatory commitments in the pre-establishment phase of an investment, the ECT might become more effective in facilitating flows of FDI in the RES sector.

In the following paragraphs, the definitions of 'investment', 'investor', and 'economic activity in the energy sector' will be analyzed. The definitions of these terms can be found in Art. 1, which is outside Part III of the treaty. However, since these definitions define the scope of the substantive obligations of Part III, they will briefly be introduced.

4.3.1. Definition of 'Investor'

The definition of investor is important in both substantive and procedural terms: the obligations of Part III apply with regards to investments of investors of other contracting parties and only investors in the sense of the treaty may invoke the procedural ISDS mechanism.[53] The term is as followed defined in Art. 1(7) ECT:

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49. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 104-105.
50. The present author has done research at the archives of the Energy Charter Secretariat, where many of the documents surrounding the ECT's negotiations are being stored.
51. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 105-107. Kaj Hober, 'The Energy Charter Treaty – An Overview' [2007] 8(3) Journal of World Investment & Trade 323. P. 325.
52. Jonathan Bonnitcha, Assessing the Impacts of Investment Treaties: Overview of the Evidence (IISD 2017). <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf> accessed on 24/01/2019. Pp. 3-4.
53. See for example: Articles 10, 11, 12, 13, 14 and 26, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998). Crina Baltag, *The Energy Charter Treaty: the Notion of Investor* (Kluwer Law International 2012). P. 16.

> ""Investor" means:
>
> (a) with respect to a Contracting Party:
>
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
>
> (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party"

This definition covers both natural and legal persons and requires a link between the investor concerned and a contracting party to the ECT.[54] What becomes evident from this definition is that domestic law, relating to citizenship, permanent residence, and legal entities, plays an important role.[55]

Natural persons can be considered as 'investors' under the ECT when they either possess the citizenship or nationality of a contracting party or when they reside there permanently in accordance with the applicable law. Since investments in the energy sector are often characterized by their 'large' size and the fact that they are often made for the 'long-term', most investment disputes in the energy sector are brought by corporate entities, although ECT practice from the oil and gas sector demonstrates that such cases may also be brought by natural persons.[56] Many forms of RES, such as hydro, thermal solar, tidal, biomass, and wind still require very significant investments, other forms of RES, such as PV solar and geothermal can more easily be exploited by less wealthy investors. This development has made it more likely that natural persons will be the affected investors that initiate arbitration proceedings, which is currently evidenced by the list of pending ECT RES disputes.[57]

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54. Crina Baltag, *The Energy Charter Treaty: the Notion of Investor* (Kluwer Law International 2012). P. 16.
55. Award, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, 2004. Para. 55.
56. Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). P. xlvii. *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18. *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC - Case No. V (064/2008). *Anatolie and Gabriel Stati, Ascom Group S.A., Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC – Case No. 116/2010.
57. Of the 'Solar Panel' cases based on the ECT, the following were brought by at least one natural person*Antaris Solar and Dr. Michael Göde v. Czech Republic*, UNCITRAL Ad hoc, PCA Administered. *Mathias Kruck, Ralf Hofmann, Frank Schumm, Joachim Kruck, Peter*

It has been said that when 'investment treaties only provide for investors to be nationals of a state in accordance with the law, tribunals have been reluctant to apply other requisites in addition to the plain language of the treaties, such as the rule of 'genuine link'.'[58] Since the ECT does not contain any additional requirements, the nationality or citizenship – which in the *Cem Uzan v. Turkey* case were considered to have identical meanings – of natural persons will thus have to be established by reference to the domestic law of the claimed home State.[59] The same holds true with regards to investors that claim to be a permanent resident, although the amount of investment cases dealing with permanent residents is negligible.[60] As in the case of nationality or citizenship, 'determinations by domestic authorities' regarding the domestic law of a contracting party concerning permanent residence are not binding upon an investment tribunal although they are considered 'highly persuasive.'[61]

With regards to legal persons, Art. 1(7)(a)(ii) contains a broad definition by referring to 'a company or other organization organized in accordance with the law applicable in that' contracting party.[62] Contracting parties thus have a 'broad discretion in deciding on the forms a company may take' and, consequently, the legal forms an 'investor' may take for the purposes of the ECT.[63] On the basis of this provision, the relevant test for the ECT concerns the place of incorporation: which 'indicates that the company is viewed as possessing the

Flachsmann, Rolf Schumm, Karsten Reiss, Jürgen Reiss v. Kingdom of Spain, ICSID Case No. ARB/15/23. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3.

58. Crina Baltag, *The Energy Charter Treaty: the Notion of Investor* (Kluwer Law International 2012). Pp. 76-77. Footnotes omitted.
59. Ibid. Pp. 76-80. Award on Respondent's Bifurcated Preliminary Objections, *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, 2016. Para. 139. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Paras. 129-132. Award, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V (116/2010), 2013. Paras. 742-743. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 65.
60. Award on Respondent's Bifurcated Preliminary Objections, *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, 2016. Para. 156.
61. Id. Lucy F. Reed & Jonathan E. Davis, 'Who is a Protected Investor?' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 620.
62. Decision on Jurisdiction, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, 2012. Para. 420. Craig Bamberger, 'An Overview of the Energy Charter Treaty' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996). P. 9.
63. Crina Baltag, *The Energy Charter Treaty: the Notion of Investor* (Kluwer Law International 2012). P. 104.

nationality of the state of incorporation and the laws of this state are governing the company.'[64] Is has been said that the definition of 'investor' is broad and, since the definition merely provides for the test of incorporation, the ECT can be used to strategically channel investments through foreign jurisdictions to obtain investment protection.[65] This way, domestic investors may obtain investment protection by channeling their investments via foreign jurisdictions and since a 'substantial business activities' test is not included, mailbox companies are entitled to full range of investment protection standards.[66]

4.3.2. Definition of 'Investment'

The definition of 'investment' is contained in Art. 1(6) ECT:

> ""Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

64. Ibid. P. 106. Markus Perkams, 'Protection for Legal Persons' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 642. Interim Award on Jurisdiction and Admissibility, *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. 2005-05/AA228, 2009. Paras. 411-415. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, 2018. Paras. 176-177.
65. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 247. Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Para. 556. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Para. 671.
66. Crina Baltag, *The Energy Charter Treaty: the Notion of Investor* (Kluwer Law International 2012). Pp. 141-146. Interim Award on Jurisdiction and Admissibility, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2009. Paras. 411-417 & 435. Decision on Jurisdiction, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2005. Para. 128. See also: Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 262. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 414-417. Decision on Jurisdiction, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2016. Para. 145.

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector."

In addition, the two subsequent paragraphs make the following specifications:

"A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat."

In order to fall within the scope of the ECT, an investment thus has to be associated with an economic activity in the energy sector. This term will be analyzed in the next section.

It has been said that the ECT contains an extremely broad definition of investment: the provision makes clear that an investment can be 'every kind of asset, owned or controlled directly or indirectly'.[67] The subsequent list is non-exhaustive.[68] The broadness of the definition has been emphasized by ECT tribunals as well as

67. Crina Baltag, *The Energy Charter Treaty: the Notion of Investor* (Kluwer Law International 2012). Pp. 167-183.
68. Ibid. P. 169.

scholars.[69] More recent investment treaties sometimes contain a slightly narrower definition of investment.[70] For example, recent IIA's concluded by the EU, such as the CETA, EU-Singapore BIT, and the EU-Vietnam BIT still emphasize that an investment can consist of 'every kind of asset', but only when it has the characteristics of an investment 'which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.'[71] A similar approach

69. ECT tribunals: Decision on Jurisdiction, Liability and Partial Decision on Quantum, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, 2019. Para. 185. Award, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V (116/2010), 2013. Paras. 806-807. Final Award, *Remington Worldwide Limited v. Ukraine*, SCC Case No. V(I 16/2008), 2011. P. 194. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, 2008. Paras. 36 & 42. Dissenting Opinion of Marc Lalonde, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, 2012. Para. 7. Decision on Jurisdiction, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2005. Paras. 125 & 128. Interim Award on Jurisdiction and Admissibility, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2009. Para. 430. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 263. Unofficial Translation of the Arbitral Award, *Energoalliance Ltd v. the Republic of Moldova,* UNCITRAL, 2013. Para. 227. Award, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, 2012. Para. 255. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 5.47. Decision on Jurisdiction, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2016. Para. 156. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, 2018. Para. 195.
Scholars: Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 54-55. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 246. Thomas Wälde, 'International Investment Under the 1994 Energy Charter Treaty' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996). Pp. 270-273. Esa Passivitra, 'The Energy Charter Treaty and Investment Contracts: Towards Security of Contracts' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996). Pp. 356-358.
70. The NAFTA, a contemporary of the ECT, also had a different definition that was more restrictive by using a closed-list definition: Article 1139, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994). Jan Asmus Bischoff & Richard Happ, 'The Notion of Investment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 501-502.
71. Article 8.1, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Article 1.2(g), EU-Vietnam Investment Protection Agreement (adopted 30/06/2019, entrance into force still pending). Article 1.2(1), EU-Singapore Investment Protection Agreement (adopted 19/10/2018, entrance into force still pending).

has been adopted by the 2012 US Model BIT, 2015 Norway Draft Model BIT, and the Korea-US FTA .[72] This is largely a codification of the so-called *Salini* criteria that are often used to define the term 'investment' under Art. 25(1) of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention).[73] In ECT arbitration, tribunals have rendered inconsistent decisions on the relevance of the *Salini* criteria when interpreting the definition of 'investment' under the ECT.[74] Also, some recent IIA's concluded by the EU contain a slightly different non-exhaustive list of forms that an investment can take as the list is more elaborate and more specific.[75] The CETA and EU-Vietnam BIT for example explicitly exclude certain claims of money as an investment.[76] The Comprehensive and Progress Agreement for Trans-Pacific Partnership (CPTPP) adopts a similar yet not identical approach.[77]

4.3.3. Definition of 'Economic Activity in the Energy Sector'

In order to fall within the scope of the ECT, the investment has to be associated with an economic activity in the energy sector as defined in Art. 1(5) ECT:

> ""Economic Activity in the Energy Sector" means an economic activity concerning the exploration, extraction, refining, production,

72. Article 1, US Model BIT, 2012. Article 2(2), Norway Draft BIT, 2015. Article 11.28 Korea-United States Free Trade Agreement (adopted 30/06/2007, entered into force 15/03/2012). Jan Asmus Bischoff & Richard Happ, 'The Notion of Investment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 503.
73. Article 25(1), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18/03/1965, entered into force 14/10/1966). Decision on Jurisdiction, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, 2001. Para. 52. Jan Asmus Bischoff & Richard Happ, 'The Notion of Investment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 506-514.
74. Excerpts of Award, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, 2012. Paras. 382-383. Award, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010, 2013. Paras. 806-807. Dissenting Opinion of Arbitrator Dominic Pellew, *Energoalliance Ltd v. the Republic of Moldova,* UNCITRAL, 2013. Paras. 20-21. Dylan Geraets & Leonie Reins, 'Article 1 – Definitions' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 27.
75. Cees Verburg, 'De Bescherming en Bevordering van Buitenlandse Energie Investeringen in Europese Investeringsverdragen: Het Einde van de Nederlandse 'Gouden Standaard'?' [2017] (5) Nederlands Tijdschrift voor Energierecht 138. P. 142.
76. Article 8.1, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Article 1.2(g), EU-Vietnam Investment Protection Agreement (adopted 30/06/2019, entrance into force still pending).
77. Article 9.1, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018).

> storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."

This requirement underlines that the ECT's scope is limited to the energy sector, contrary to most other IIA's that apply across all economic sectors. An understanding agreed upon at the conclusion of the ECT contains a list of illustrative activities that would qualify as such:

> "(i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;
>
> (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
>
> (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;
>
> (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;
>
> (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
>
> (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and
>
> (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency."[78]

78. Understanding 2, Final Act of the European Energy Charter Conference.

This understanding explicitly mentions that the construction and operation of power generation facilities, including those powered by wind and other forms of RES are to be considered as an activity in the energy sector. According to the *Blusun v. Italy* tribunal, the words 'construction and operation' do not impose a cumulative requirement.[79] For that reason, there seems to be little discussion that RES investments which generate electricity are covered.[80]

In the *Amto v. Ukraine* case, the tribunal had to elaborate on how closely an economic activity has to be associated with the energy sector as the claimant in that case provided technical services, such as 'electrical installation, repairs and technical reconstruction or upgrading' to a nuclear power plant.[81] According to the tribunal:

> "… the interpretation of the words 'associated with' involves a question of degree, and refers primarily to the factual rather than legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector. The open-textured phrase 'associated with' must be interpreted in accordance with the object and purpose of the ECT, as expressed in Article 2. The associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector."[82]

In this case the tribunal would eventually consider that the investment was associated with an economic activity in the energy sector since the services

79. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 263.
80. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Para. 682. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 5.50.
81. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, 2008. Para. 40. See also: Thomas Wälde, 'International Investment Under the 1994 Energy Charter Treaty' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996). Pp. 273-274.
82. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, 2008. Para. 42.

provided by the company in which the investor had invested were directly related to the production of energy.[83]

4.4. Conclusion

Having set out this general background of the ECT, the third sub-question can now be answered. This question reads in full:

> 'Under what circumstances was the ECT negotiated and concluded, what are the main 'pillars' of the treaty, and to what extent do RES fall under the scope of the existing treaty?'

The ECT was negotiated and concluded in the early 1990's with the purpose of establishing a legal framework that could promote long-term cooperation in the energy field. The main pillars of the treaty relate to trade, transit, and investment. All of these pillars were supplemented with specific procedures for dispute settlement. Over the last 25 years, the trade provisions of the ECT lost significance because of increased participation by ECT contracting parties in the WTO. Furthermore, the transit provision has not prevented transit disputes nor has it successfully settled such disputes.

In practice, this means that the investment chapter is currently the most relevant one. This is evidenced by the number of occassions in which foreign investors have invoked this part of the treaty. As becomes clear from an understanding that was adopted at the ECT's conclusion, RES generation facilities are to be considered as economic activities in the energy sector. It has to be noted however, that this latter point can almost be taken as self-evident since it has never been questioned in ECT disputes.

83. Ibid. Para. 43.

CHAPTER 5.

Investment Protection in Part III of the Energy Charter Treaty

5. INVESTMENT PROTECTION IN PART III OF THE ENERGY CHARTER TREATY

This chapter will examine the existing legal framework of the ECT concerning investment protection. These provisions can protect RES investors against regulatory and political risk by prescribing the rule of law.

The sections below will analyze the various standards of investment protection by reference to i) comparable provisions under other IIA's, ii) ECT arbitral practice, to shed light on the interpretation and application of the norms in practice, and iii) the relevance of these standards for RES investors. Finally, some sections will also briefly recall recent treaty practice in relation to some standards.

5.1. STABLE, EQUITABLE, FAVORABLE AND TRANSPARENT INVESTMENT CONDITIONS

The first provision of the ECT that is relevant for this chapter is Art. 10(1) ECT. This rather lengthy provision contains various standards of investment protection and provides for the following:

> "Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[1]

1. Article 10(1), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).

The various standards of investment protection of Art. 10(1) ECT will be analyzed separately in the sections (5.2 through 5.6) below. This first section will address the first sentence of Art. 10(1): 'Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable, and transparent conditions for Investors of Other Contracting Parties to Make Investments in its Area.'

5.1.1. Legal Comparison of IIA's

The legal significance of the first sentence of Art. 10(1) ECT has been contested. For example, Happ argued that the first sentence refers primarily to the legal framework of each Contracting Party that is taken into account by investors when making their investment, which suggests that it is not meant as a post-establishment investment protection standard.[2] Roe and Happold argue that, due to the vagueness of the language used in the first sentence, it can hardly be said that this provision contains an actual obligation.[3] This suggests that the first sentence may be more closely related to investment promotion rather than protection.

In other IIA's, language comparable to Art. 10(1) first sentence ECT can most often be found in preambles rather than the operative part.[4] The reference in the first sentence to 'shall […] encourage and create', and more particularly the word 'encourage' is not normative but rather expresses a 'best endeavors' obligation.[5]

5.1.2. ECT Arbitral Practice

The ambiguity surrounding the first sentence is also evidenced in arbitral practice. In essence, the question is whether the first sentence contains an

2. Richard Happ, 'The Energy Charter Treaty' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 248.
3. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 107.
4. See for example: Preamble, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Bolivia for the Promotion and Protection of Investments (United Kingdom-Bolivia) (adopted 24/05/1988, entered into force 16/02/1990). Preamble, Agreement between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (Belgium/Luxembourg-China) (adopted 06/06/2005, entered into force 01/12/2009). Preamble, Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan Concerning the Encouragement and Reciprocal Protection of Investments (Germany-Afghanistan) (adopted 20/04/2005, entered into force 12/10/2007).
5. Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford University Press 2007). Pp. 220-221.

obligation and cause of action that can be used by investors to base a claim on, or whether it is merely an introductory sentence that aims to put the remainder of Art. 10(1) ECT in context.[6]

According to several ECT tribunals the first sentence provides for more than just an introduction for the remaining sentences of Art. 10(1) ECT. In *Energoalliance v. Moldova,* the tribunal established that Moldova had breached its obligation 'to create "stable, equitable, favourable and transparent conditions" for Claimant's Investment.'[7] The *Blusun v. Italy* tribunal held that '[t]he five sentences of Art. 10(1) embody commitments towards investments, in accordance with their terms. None is mere preambular or hortatory.'[8]

These views can be contrasted with those of other ECT tribunals. Quite unequivocally, the *AES v. Kazakhstan* tribunal held that the first sentence:

> "[…] is an introductory sentence aimed at putting the further obligations laid out in Article 10(1) of the ECT into perspective. As such, it has mainly programmatic character and does not provide for an independent standard of protection or right of action of a kind that is sufficiently specific to be relied upon by an investor."[9]

Similar views were adopted in *Plama v. Bulgaria, Isolux v. Spain*, *Novenergia v. Spain,* and *Foresight v. Spain*.[10] These tribunals either consider the first sentence to introduce the subsequent provisions or consider the obligation to create stable,

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6. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 314.
7. Unofficial Translation of the Arbitral Award, *Energoalliance Ltd v. the Republic of Moldova,* UNCITRAL, 2013. Para. 356.
8. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 319.
9. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Paras. 380-382.
10. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Paras. 172-174. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 764-766. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Paras. 642-646. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 361.

equitable, favourable, and transparent conditions for investors as part of the FET standard.[11]

5.1.3. Relevance for Renewable Energy Investors

Notwithstanding the different views of ECT tribunals on the legal significance of the first sentence, it is quite relevant for RES investors.

In the RES cases *Isolux v. Spain, Eiser v. Spain, Novenergia v. Spain* and *Foresight v. Spain*, the tribunals all considered the relevance of the first sentence of Art. 10(1) ECT, in particular when interpreting the Fair and Equitable Treatment (FET) standard.[12] The fact that the first sentence explicitly refers to 'stable, equitable and transparent conditions' for investors therefore provides a context, in the sense of Art. 31(2) VCLT, in which the FET standard has to be interpreted. In practice, this means that investors can more easily argue that their legitimate expectations, which existed when making their investment, for example concerning the stability of regulatory regimes, are protected under the ECT. The legal significance of the first sentence, even when it is considered as an introductory sentence, should therefore not be underestimated as it can have a significant influence on the interpretation of the subsequent provisions of Art. 10(1) ECT in comparison to IIA's which do not make reference to stable and transparent conditions for investors. However, since it is primarily viewed as part of the FET standard, it will not be further examined here.

5.2. FAIR AND EQUITABLE TREATMENT

The second sentence of Art. 10(1) ECT contains the FET standard, which in practice is one the most important provisions for RES investors since it may,

11. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Paras. 73-74. See also: Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 529. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 483. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 487. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 570.
12. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Para. 764-766. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 646. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 361. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 381.

amongst others, protect the legitimate expectations of investors, which may include the expectation that RES support schemes are not fundamentally altered after a RES facility has become operational.[13]

The FET standard is a common provision that can be found in most IIA's, although differences in the phrasing of FET standards are plentiful.[14] Strikingly, a more precise definition of what would amount to a breach of the FET standard is not provided for by the ECT. According to Brower, the FET standard is 'an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in particular disputes.'[15] The vagueness of the FET standard is both problematic and probably the key to its success. On the one hand, it is problematic since it is difficult to establish what amounts to a breach of FET, and expansive interpretations might infringe on the sovereign right to regulate. While, on the other hand, investors rely on the FET standard very often nowadays because, due to its vagueness, recourse to the FET standard is appealing for an aggrieved investor.[16] Also, it is widely recognized that the provision is firmly rooted in international law and thereby operates independently from national law.[17] As such it sets a minimum standard of treatment that has to be respected by contracting parties, regardless of the content of national law.

5.2.1. Legal Comparison of IIA's

Adding further to the complexity of the FET standard is the fact that various formulations of the standard exist in IIA's, which means that the content may differ

13. The second sentence reads: 'Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.'
14. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 218.
15. Charles H. Brower II, 'Investor-State Disputes Under NAFTA: The Empire Strikes Back' [2001] 40 Columbia Journal of Transnational Law 43. P. 56. Charles H. Brower II, 'Structure, Legitimacy and NAFTA's Investment Chapter' [2003] 36 Vanderbilt Journal of Transnational Law 37. P. 66.
16. Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties [2005] 39 International Lawyer 87. P. 87. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 218.
17. Stephan W. Schill, *Cambridge International Trade and Economic Law: The Multilateralization of International Investment Law* (Cambridge University Press 2009). P. 263. Award, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 2001. Para. 367. Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008). P. 42. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008). P. 123.

from treaty to treaty.[18] The United Nations Conference on Trade and Development (UNCTAD) has identified roughly the following variations.[19]

Firstly, there are unqualified standards which were often adopted by capital exporting European countries.[20] Sometimes these unqualified FET standards were linked to other standards of treatment, such as the most constant security and protection obligation, although linkages to National Treatment (NT) and Most Favored Nation (MFN) treatment also exist.[21] The lack of qualification gives a potentially broad scope to the FET standard which may provide for a high level of investment protection that goes beyond the international minimum standard of treatment as derived from customary international law.[22]

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18. Marc Jacob & Stephan W. Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 704-707.
19. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). Pp. 17-35. Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' [2013] 30 Journal of International Arbitration 361. P. 373.
20. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). P. 20. Article 3(1), Agreement between the Belgium-Luxembourg Economic Union and the Republic of Tajikistan on the Reciprocal Promotion and Protection of Investments (Belgium/Luxembourg-Tajikistan) (adopted 12/02/2009, entrance into force still pending). Article 2(2), United Kingdom Model BIT, 2008. Article 3(1), Netherlands Model BIT, 2004. Article 2(2), Germany Model BIT 2008. Article 4(1), Switzerland Model BIT, 1995.
21. Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008). P. 43. Article 4(2), Agreement between the Swiss Confederation and the Republic of Chile on the Promotion and Reciprocal Protection of Investments (Switzerland-Chile) (adopted 24/09/1999, entered into force 02/05/2002). Article 3(2), Agreement between the Swiss Confederation and the Republic of Belarus on the Promotion and Reciprocal Protection of Investments (Switzerland-Belarus) (adopted 28/05/1993, entered into force 13/07/1994). Article 2(2), Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Armenia for the Promotion and Protection of Investments (United Kingdom-Armenia) (adopted 27/05/1993, entered into force 11/07/1996).
22. This is argued by the tribunal in the *Vivendi v. Argentina* case, which held that the standard 'can just as readily set a floor as a ceiling.' Award, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, 2007. Para. 7.4.7. Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Development' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008). P. 114. Award, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 2008. Para. 591. Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' [2013] 30 Journal of International Arbitration 361. P. 376. Hussein Haeri, 'A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard

Secondly, there are IIA's that link the FET standard to international law by stating that treatment 'shall in no case be less favorable than that required by international law' as was the case in many BIT's concluded by the US in the 1990's.[23] Comparable to the unqualified standard, these provisions appear to 'set the floor of protection that can be claimed by an investor', which means expansive interpretations can result in a relatively high level of investment protection.[24] An alternative formulation of this standard states that FET shall be granted 'in accordance with international law', which allows tribunals to take into account other sources of international law as well, including customary international law and general principles of law.[25]

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in International Law [2011] 27 Arbitration International 27. Pp. 36, 45. Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' [2005] 6 Journal of World Investment & Trade 357. P. 360. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). Pp. 11-13, 22.

23. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). P. 22. Article 3(2), Agreement between the Government of the Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments (Croatia-Oman) (adopted 04/05/2004, entrance into force still pending). Article 2(3)(a), Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investments (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001). Article II(2)(a), Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (Argentina-United States of America) (adopted 14/11/1991, entered into force 20/10/1994). Article II(3)(a), Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (United States of America-Ecuador) (adopted 27/08/1993, entered into force 11/05/1997). Article II(3)(a), Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (United States of America-Ukraine) (adopted 04/03/1994, entered into force 16/11/1996).
24. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). P. 23. Award, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, 2007. Paras. 257-258. Award, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, 2007. Para. 7.4.7. Award, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, 2007. Para. 302. Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Para. 361. Award*, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, 2008. Paras. 336-337. Decision on Jurisdiction and Liability, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 2010. Para. 253.
25. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). P. 22. Stephan W. Schill, 'Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press 2010). P. 159. Article 3(2), Agreement between the Government of the Republic of Croatia and the Government of the Sultanate of Oman on the Promotion and Reciprocal Protection of Investments (Croatia-Oman) (adopted 04/05/2004, entrance into force still pending).

These formulations can primarily, but not exclusively, be found in older IIA's, in particular those concluded in and before the 1990's. While various tribunals have been struggling with the exact content of the vague norm, arbitral practice demonstrates that various elements fall within its scope.[26] These may include: i) the protection of an investors' legitimate expectations;[27] ii) the requirement that the legal framework has to be transparent, consistent, stable and/or predictable;[28] iii) a prohibition on the denial of justice and the obligation to provide due process

26. Sentence Arbitrale, *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, 2003. Para. 51. Award, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 2001. Para. 367. Award, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2005. Para. 273. Final Award, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, 2001. Para. 292. Marc Jacob & Stephan W. Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 717-743.
27. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 9.3.6-9.3.12. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.75. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 486. Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Para. 302. Award*, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 2003. Para. 154. Arbitral Award, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, 2006. Para. 147. Award, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, 2004. Para. 114. Award*, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, 2008. Para. 347. Award, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, 2008. Para. 186.
28. Final Award, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, 2004. Para. 183. Award, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2005. Para. 274. Award, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, 2007. Para. 250. Award, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 2000. Para. 99. Award*, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, 2003. Para. 154.

of law;[29] iv) a prohibition on arbitrary and/or discriminatory conduct;[30] and v) a prohibition on coercion and harassment by the host State.[31]

The ECT incorporates elements that resemble the characteristics of both formulations described above. On the one hand, the sentence containing the FET standard is unqualified while, on the other hand, the fourth sentence of Art. 10(1) ECT adds that '[i]n no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.'[32] The ECT's FET standard therefore seems to set a floor of treatment that has to be accorded rather than a ceiling, which means that a potentially high level of investment protection is available.[33]

As a response to the sometimes expansive interpretations given to the FET standard by investment tribunals, various States have attempted to limit the scope of the FET provision. At present, it seems that two different approaches are emerging.[34]

Firstly, some treaties tie the FET standard to the international minimum standard of treatment under customary international law.[35] Well-known examples include Art.

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29. Award, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 2002. Para. 127. Final Award of the Tribunal on Jurisdiction and Merits, *Methanex Corporation v. United States of America*, UNCITRAL, 2005. Part IV Chapter C Para. 15. Partial Award, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, 2000. Para. 134. Award, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, 2004. Para. 98. Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Para. 308.
30. Final Award, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, 2012. Para. 221. Award, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 2009. Para. 178.
31. Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Para. 308.
32. Anatole Boute, *Russian Electricity and Energy Investment Law* (Brill Nijhoff 2015). P. 628.
33. Id.
34. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 416.
35. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). P. 23. Article 5, Norway Draft Model BIT, 2015. Article 7, Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco-Nigeria) (adopted 03/12/2016, entrance into force still pending). Article 3, India Model BIT, 2015. The India Model BIT merely contains a reference to treatment in accordance with customary international law, the reference to FET is omitted. See: Sherina Petit, Mathew Buckle & Daniel Jacobs, 'India Releases a New Model BIT' [2016] 19 International Arbitration Law Review N-32. Pp. N33-35.

1105 NAFTA and Art. 9.6 CPTPP.[36] The exact content of the international minimum standard is, however, contested. On the one hand, there are contemporary tribunals that consider the standard, as defined in the 1928 *Neer* case, to be applicable, which requires government measures to amount to an 'outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental actions so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency' before a violation of international law can be established.[37] There are also tribunals, on the other hand, that consider that the standard has evolved since 1928 which lowers the threshold of liability by requiring arbitrary, grossly unfair, unjust or idiosyncratic, or discriminatory

36. Article 1105, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994). NAFTA Free Trade Commission, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001. Article 9.6, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018). See also: Article 14.6, United States-Mexico-Canada Agreement (adopted 30/11/2018, entrance into force still pending). Article 6, Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (Canada-Hong Kong) (adopted 10/02/2016, entered into force 06/09/2016). Article II, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (Canada-Latvia) (adopted 05/05/2009, entered into force 24/11/2011). Article 6, Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada-Mali) (adopted 28/11/2014, entered into force 08/06/2016). Article 5, Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (Canada-Peru) (adopted 14/11/2006, entered into force 20/06/2007). Article 6, Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (Canada-Senegal) (adopted 27/11/2014, entered into force 05/08/2016). Article III, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada-Slovakia) (adopted 20/07/2010, entered into force 14/03/2012). Article 6, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (Canada-Serbia) (adopted 01/09/2014, entered into force 27/04/2015). Article 5, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Article 5, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012). Article 4, Mexico Model BIT, 2008.
37. Decision, *L.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States,* United States-Mexico Claims Commission 1926. Award, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, 2009. Para. 627. Award, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, 2009. Para. 284. The *Eli Lilly v. Canada* Tribunal adopted the definition of the international minimum standard of the *Glamis Gold* Tribunal without making a statement on the relationship to the *Neer* case: Final Award, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, 2017. Para. 222.

conduct that exposes the investor to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.[38] When applying this standard tribunals have considered it 'relevant that the treatment is in breach of representations made by the host Sate which were reasonably relied on' by the investor.[39]

Benefits of adopting this standard are that it places the burden of proof of establishing the content of this standard on the investor, which may be challenging considering that it requires evidence of State practice and *opinio iuris*.[40] Also, the threshold of liability is higher in comparison to the formulations that were discussed previously.[41] Nevertheless, one could say that the standard is equally vague as the undefined standard, notwithstanding the fact that the threshold of liability might be higher.[42]

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38. Award, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, 2004. Paras. 98-99. Award, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 2002. Paras. 116-117. Award, *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, 2003. Para. 180. Award, *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, 2010. Paras. 193 & 213.
39. Award, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, 2004. Paras. 98-99. Award on Jurisdiction and Liability, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, 2015. Paras. 427, 442-443. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Paras. 491-502.
40. Award, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, 2009. Paras. 602-618. *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13. P. 20 Para. 27. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226. P. 253 Para. 64. Malcolm N. Shaw, *International Law* (Cambridge University Press 2008). P. 74. Stephan W. Schill, 'Case Note – *Glamis Gold, Ltd. v. United States of America*' [2010] 104 American Journal of International Law 253. P. 258.
41. Award, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, 2009. Para. 285. Excerpts of Award, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, 2012. Paras. 263-265. Ursula Kriebaum, 'FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA)' [2016] 13 Transnational Dispute Management 1. P. 15. Stephan W. Schill, 'Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press 2010). P. 153.
42. Ursula Kriebaum, 'FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA)' [2016] 13 Transnational Dispute Management 1. P. 15. Stephan W. Schill, 'Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press 2010). P. 153.

A second emerging approach that attempts to curtail the scope of the FET standard is one that clearly spells out the content of the norm by providing an (exhaustive) list of elements that are to be considered as a breach of FET.[43] This approach is adopted by the EU in recent IIA's concluded with Canada, Singapore, Vietnam, and Mexico.[44] Commonly included elements that are considered to violate the FET standard are i) denial of justice; ii) fundamental breach of due process; iii) manifest arbitrariness; iv) targeted discrimination; and v) abusive treatment.[45] It has to be noted, however, that while these lists may sometimes be comparable, they are not necessarily identical.

In comparison to the undefined FET standards, these more recent IIA's provide for more clarity on the relevant norm although in practice they may also provide for less investment protection – depending of course on the exact content of the (exhaustive) list.

On the basis of this comparison it becomes clear that the undefined FET standard of the ECT potentially provides for a high level of investment protection which goes beyond the FET standards of for example NAFTA or CETA.[46]

5.2.2. ECT Arbitral Practice

The conclusion that the ECT's FET standard provides for a higher level of investment protection than for example NAFTA is confirmed by the *Liman Caspian Oil v. Kazakhstan* tribunal:

> "[…] the Tribunal considers that the purpose of ECT Article 10(1), second sentence, is to provide a protection which goes beyond the minimum standard of treatment under international law. The ECT was intended to go further than simply reiterating the protection

43. UNCTAD, *Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012). P. 29.
44. Article 8.10, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Article 2.4, EU-Singapore Investment Protection Agreement (adopted 19/10/2018, entrance into force still pending). Article 2.5, EU-Vietnam Investment Protection Agreement (adopted 30/06/2019, entrance into force still pending). Investment Chapter, Article 15, EU-Mexico Global Agreement (adoption and entrance into force are still pending).
45. See also: Article 9, Netherlands Model BIT, 2019. Article 4, Belgium-Luxembourg Economic Union Model BIT, 2019.
46. Stephan W. Schill, 'Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press 2010). P. 152.

> offered by the latter. In this respect, ECT Article 10(1), second sentence, differs from NAFTA Article 1105 (in its interpretation given by the Free Trade Commission on 31 July 2001) which contains an express reference to international law. Therefore, when assessing Respondent's actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT."[47]

Contrary to NAFTA tribunals, ECT tribunals have refrained from establishing a general outline of the content of the ECT's FET standard. Instead, they have primarily examined and applied the standard on a case-by-case basis while focusing on the specific facts of each individual case. Nevertheless, an examination of ECT jurisprudence identifies that the following elements are part of the FET obligation: i) the obligation to comply with due process requirements and avoid a denial of justice;[48] ii) a prohibition on arbitrary or discriminatory treatment;[49] iii) a prohibition on corruption;[50] and iv) a prohibition on coercion or harassment.[51] Also, it is a widely held view in ECT arbitration that the FET

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47. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 263. See also: Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 530. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Paras. 258 & 263.
48. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 176. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 75. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.74. Unofficial Translation of the Arbitral Award, *Energoalliance Ltd v. the Republic of Moldova,* UNCITRAL, 2013. Para. 356. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 221. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Para. 321. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Paras. 273-279.
49. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.74. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Paras. 428-429.
50. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 422.
51. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 221. Award in Respect of Damages, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, 2002. Para. 68. Award,

standard protects legitimate expectations, and tribunals have considered the FET standard in light of the first sentence of Art. 10(1) ECT. Since these latter two aspects are of great importance to RES investors, they will be addressed more in-depth in the following sections.

5.2.2.1. Legitimate Expectations

It is widely acknowledged by ECT tribunals that the FET standard protects the legitimate expectations of an investor.[52] This is highly relevant to RES investors since it potentially means that commitments undertaken by States towards investors, such as those contained in national support schemes for RES, may be protected under international law. This may provide RES investors with a ground to challenge measures that alter the regulatory framework which they relied upon when making their investments.

From an analysis of ECT cases concerning legitimate expectations claims, it becomes clear that, in order to successfully bring a claim under the notion of legitimate expectations of the FET standard, several aspects seem to be important. As stated by several tribunals, for example, only legitimate expectations

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Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, 2003. Para. 154. Award, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V (116/2010), 2013. Paras. 1086-1092.

52. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 176. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.74. Award, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2015. Para. 155. Award, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 9.3.8-9.3.12. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 200. Award, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V (116/2010), 2013. Para. 941. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 695. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 486. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 362. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 775-784. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 260. Award, *CEF Energia B.V. v. Italian Republic*, SCC Case No. 158/2015, 2019. Para. 184. Decision on Jurisdiction, Liability and Quantum Principles, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 2019. Para. 582.

that were present at the time the investment was made are relevant.[53] Although assurances made by the State towards the investor post-establishment can be highly relevant when considering a legitimate expectations claim, as is evidenced by the *Masdar v. Spain* case.[54]

In addition, several tribunals have stressed that the expectations must have arisen because the host State made certain representations or assurances that were relied upon by the investor when making the investment and with which the host State eventually failed to comply.[55] In the absence of such specific commitments, most tribunals have concluded that the ECT does not limit the

53. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 176. Award, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2015. Para. 193. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 9.3.9. & 9.3.17. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 695. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Para. 784. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 498. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 362. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 447. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 649. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 263.

54. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, 2018. Paras. 119, 123, 511-522.

55. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 176. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 9.3.17. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 486. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 200. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Paras. 542-545. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Paras. 496-499. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Paras. 500-503. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Paras. 583-586.

States' power to modify its legislation.[56] To use the words of the *Blusun v. Italy* tribunal: 'tribunals have so far declined to sanctify laws as promises.'[57]

Also, the *Blusun* tribunal held that:

> "In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime. These considerations apply even more strongly when the context is subsidies or the payment of special benefits for particular economic sectors."[58]

Thus, in order for a general legal framework to give rise to legitimate expectations that are protected under international law, an investor will require a commitment that this general legal framework will not be modified.[59]

Also, the expectations have to be reasonable, legitimate and/or justifiable, which has to be assessed in an objectified manner, which means that the subjective expectations and desires of investors are not conclusive.[60] The *Mohammad*

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56. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 362. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 372. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 356. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Paras. 530, 531 and 538. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 450-452.
57. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 367.
58. Ibid. Para. 372, see also para. 319.
59. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 498-499. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Para. 289.
60. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 176. Award, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2015. Para. 165. Partial Award, *Saluka Investments B.V. v. The Czech*

Ammar Al-Bahloul tribunal quoted an Award where 'legitimate' was defined as follows:

> "[…] the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representations that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment."[61]

Finally, it has to be emphasized that the host State retains its right to regulate in the public interest, which means that an ECT tribunal has to engage in a balancing exercise when determining whether the State has violated the expectations of the investor.[62] Hence, since the protection of legitimate expectations under the ECT is not absolute, this balancing exercise requires that a measure is 'unfair

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Republic, UNCITRAL, 2006. Para. 304. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 9.3.9. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 200. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 495. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 731. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Para. 400. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 355.

61. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 202. Award, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, 2007. Para. 331.

62. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 177. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.77. Award, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2015. Para. 165. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 731. ECT tribunals have made reference to the following non-ECT Awards: Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Paras. 305-307. Award, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, 2013. Para. 537.

or inequitable.'[63] Alternatively, ECT tribunals have referred to a requirement of 'reasonableness'.[64]

It has to be noted that the various tribunals have sometimes dealt differently with the considerations addressed above. Also, whether the requirements are complied with always depends on the specific facts of the case.

5.2.2.2. Stable, Equitable, Favorable, and Transparent Conditions for Investors

As was already discussed above, the relevance of the first sentence of Art. 10(1) has been construed differently by various tribunals. Several tribunals have considered that the first sentence, and the elements contained therein, are (clearly) part of the FET standard.[65]

In practice this can be used by investors to argue that, even in the absence of specific representations made by the State to the investor which could give rise to legitimate expectations that are protected under international law, regulatory changes may still violate the FET standard because the boundaries of fairness and equitableness are violated. As such it can be relied upon as subsidiary argument.

63. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Para. 401.
64. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Paras. 542 & 552-556. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Paras. 496 & 508-512. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Paras. 500 & 508-512. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Paras. 583 & 599-603.
65. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 74. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 173. The view that a lack of stability and transparency of the legal framework is unfair and inequitable is also supported by the *Mamidoil* tribunal: Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 599. See also: Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 183. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 529. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 483. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 487. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 570.

5.2.3. Relevance for Renewable Energy Investors

In current investment cases related to RES, the FET standard is arguably the most important investment protection standard which investors rely upon.

For example, in the NAFTA case *Windstream Energy v. Canada*, the investor successfully invoked Art. 1105 NAFTA. This case concerned the FIT program of Ontario, where the investor was awarded a FIT contract in 2010.[66] After being awarded the contract, the authorities put in place a moratorium on offshore wind park development that effectively cancelled the project.[67] Having put in place the moratorium, the authorities subsequently did little to address 'the legal and contractual limbo in which Windstream found itself.'[68] According to the tribunal, the failure by the authorities 'to take the necessary measures […] within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the [investors] project […] constitutes a breach' of NAFTA's FET standard.[69]

Under the ECT, the FET standard is primarily being relied upon in RES cases dealing with regulatory changes to the RES support scheme which adversely affected the investors. As stated by Reuter, '[t]aking into account that support reductions are characterized by the withdrawal or reduction of support expressed to be granted by the host State to the relevant facilities at the time of the investment, the principles of consistency, transparency and reasonableness as well was the protection of the investor's legitimate expectations appear to be at the heart of the matter.'[70] Under the ECT, such disputes have arisen with regards to Italy, the Czech Republic, Bulgaria, and Spain. Below an overview is given of the application of the ECT, and in particular the protection of legitimate expectations under the FET standard.

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66. Award, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, 2016. Paras. 117-127.
67. Ibid. Paras. 189-192.
68. Ibid. Para. 379.
69. Ibid. Para. 380.
70. Alexander Reuter, 'Retroactive Reduction of Support for Renewable Energy and Investment Treaty Protection from the Perspective of Shareholders and Lenders' [2015] 12 Transnational Dispute Management 1. P. 17. Joe Tirado, 'Renewable Energy Claims under the Energy Charter Treaty: An Overview' [2015] 12 Transnational Dispute Management 1. P. 14. Saverio Francesco Massari, 'The Italian Photovoltaic Sector in Two Practical Cases: How to Create an Unfavorable Investment Climate in Renewables' [2015] 12 Transnational Dispute Management 1. Pp. 22-24. Anna De Luca, 'Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom' [2015] 12 Transnational Dispute Management 1. Pp. 7-8.

5.2.4. Application of the FET Standard in ECT in Renewable Energy Investment Disputes

In response to regulatory changes made to RES support schemes, international investors initiated more than 40 ECT cases against Spain. For similar reasons, other ECT contracting parties, such as Italy, the Czech Republic, Greece, and Bulgaria have also been confronted with investment claims, either under the ECT or applicable BIT's.[71]

Although investors in these cases initiated various ECT standards from both Arts. 10 and 13 ECT, the primary argument of the investors is often the same, namely that these regulatory changes violated their legitimate expectations as protected under the FET standard.

At present, it seems that two alternative arguments are often put forward by investors, both closely related to the protection of legitimate expectations. Firstly, that they had the legitimate expectation that the specific regulatory regime relied upon when making the investment, in the case of Spain often RD 661/2007, would remain in place unaltered. Secondly, that even in case no such expectation could exist and the respondent State was therefore allowed to amend its regulatory framework, these changes would be implemented within the boundaries set by the FET standard of the ECT.

Arbitral awards regarding both arguments will be analyzed.

5.2.4.1. Legal Stability Expectation

In investment disputes concerning RES, the legal stability expectation is often put forward along the following lines: the investment was made on the basis of a specific regulatory regime, in the case of Spain RD 661/2007 for example, and investors had the legitimate expectation that their investment would solely be governed by this regulatory framework. Therefore, the subsequent regulatory changes to the initial framework are in violation of the FET standard.

Accepting the argument that a general legal framework can give rise to legitimate expectations would have far reaching consequences for host States as any

71. Cees Verburg & Nikos Lavranos, 'Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the *Achmea* Judgment for Intra-EU ECT Arbitrations' [2018] 3 European Investment Law and Arbitration Review 197. P. 198.

regulatory change could then lead to a violation of international obligations.[72] Therefore, numerous ECT tribunals have rejected this argument in RES disputes.[73]

In *Charanne v. Spain*, the first ECT tribunal to issue a final award in a RES case, the tribunal refused to acknowledge that, absent explicit representations made by the State to the investor, a general legal framework could give rise to a legitimate expectation – protected under international law by the ECT – that regulatory regimes would not change.[74] The tribunal considered that accepting such an argument would amount to equating the FET standard with a stabilization clause, which the tribunal considered unacceptable.[75]

Comparable statements were made in the RES cases, *Eiser v. Spain, Foresight v. Spain, Antin v. Spain, Blusun v. Italy,* and *RREEF v. Spain*.[76] Also, an arbitral tribunal that ruled in four Czech ECT disputes concerning RES, which will combinedly be referred to as the *PV Investors v. Czech Republic* cases, made a statement along comparable lines.[77]

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72. Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press 2014). P. 184.
73. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 499 & 503. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 362. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 356. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Paras. 530, 531 and 538.
74. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 499 & 503.
75. Ibid. Para. 503.
76. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 362. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 356. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Paras. 530, 531 and 538. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 319. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 321.
77. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Paras. 539-540 & 544. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Paras. 494-499. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Paras. 498-503. Award, *WA Investments-*

In conformity with other ECT awards unrelated to RES, tribunals thus emphasize that specific representations must be made by the State to the investor that contains a guarantee that a general legal framework will not be altered to the detriment of the investor before such an argument can be accepted.[78] For example, the *AES v. Kazakhstan* tribunal held rather unequivocal that '[i] nvestments are made in the context of the general regulatory framework of the host State, and it would require the very clearest of commitments on the part of the State to refrain from adjusting that regulatory framework in some specified manner to give rise to any expectation that an investment would be insulated from the effects of normal legal and regulatory evolution.'[79] In the 2018 RES case *Antaris v. Czech Republic*, the tribunal did state, however, that '[a]n expectation may arise from what are construed as specific guarantees in legislation.'[80] This latter statement could open the door to a broader interpretation of the legitimate expectations doctrine which seems to take the debate back to whether general legislation is capable of generating legitimate expectations *per se*, a discussion to which earlier ECT tribunals answered in the negative.[81]

Europa Nova Limited v. The Czech Republic, PCA Case No. 2014-19, 2019. Paras. 580-586.

78. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 176. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Paras. 200-202. Award, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 9.3.17-9.3.18. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Paras. 7.76-7.78. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Paras. 289-291. Award, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2015. Para. 155.
79. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Para. 289.
80. Award, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, 2018. Para. 360. It has to be noted, however, that the *Antaris* tribunal makes several general statements about the relevant principles that are seemingly at odds with one another. This general outline repeated in the *CEF Energia B.V. v. Italy* case: Award, *CEF Energia B.V. v. Italian Republic*, SCC Case No. 158/2015, 2019. Para. 185.
81. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 499 & 503. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 362. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 356. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Paras. 530, 531 and 538.

In some RES cases, such representations may well have been given by the State. In the *Masdar v. Spain* case, for instance, the project companies in which Masdar had invested obtained written communications from the relevant authorities after the investment had been made that explicitly confirmed that the conditions as laid down in RD 661/2007 would be applicable to its CSP plants throughout the operating lifetime of the facilities.[82] Under these circumstances, the tribunal considered that it 'would be difficult to conceive of a more specific commitment than a Resolution issued by Spain addressed specifically to each of the Operating Companies, confirming that each of the Plants qualified under the RD 661/2007 economic regime for their "*operational lifetime*".'[83] In this case, a violation of the FET standard was thus accepted because the investor had obtained written confirmation that its investments would be governed by RD 661/2007 for their entire operational lifetime.

In the *NextEra v. Spain* case, such representations had also been made to the investor.[84] In line with ECT tribunals named above, the tribunal held that a general legal framework cannot give rise to legitimate expectations since 'legislation can be changed.'[85] In this case, the investor had nevertheless obtained specific statements and assurances which the tribunal subdivided into five categories:

> '1) Statements made in writing to NextEra by Spanish officials; 2) Statements made in writing by NextEra representatives to Spanish officials that were not contradicted or disagreed with by Spanish officials (although not responded to or agreed to); 3) NextEra's internal memoranda reporting on meetings with the Spanish officials; 4) Witness statements indicating NextEra's understanding of the Spanish position' 5) Statements made to industry, and statements made to the [project companies].'[86]

According to the tribunal, the statements made in writing to NextEra constitute 'the best evidence of Spanish assurances that could be the basis for legitimate

82. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, 2018. Paras. 516-519.
83. Ibid. Para. 520.
84. Decision on Jurisdiction, Liability and Quantum Principles, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 2019. Para. 583.
85. Ibid. Para. 584.
86. Ibid. Para. 588.

expectations.'[87] In these letters, written by the Spanish Secretary of State for Energy Pedro Marin to a representative of NextEra, the Secretary of State held: 'the absolute vocation of said legislation is to preserve the legal security of all investments currently underway, thereby guaranteeing the forecasts under which said investments are to be made' and 'the new framework for the promotion of renewable energies is governed by the principles of judicial and regulatory stability and visibility, and that the actual pre-assignment in the registry guarantees the promoter the benefits of the economic regime under which it made its investment decision.'[88] Under such circumstances, the tribunal held that the investors could have the legitimate expectation that RD 661/2007 'would not be changed in a way that would undermine the security and viability of their investment.'[89] Nevertheless, the regime was 'fundamentally and radically changed' and deprived the investors of 'the security and certainty that, in light of the assurances they had received from Spanish authorities about guaranteeing the legal security of investments underway as well as the forecasts under which the investments were made and affirming legal and regulatory stability, they could have expected.'[90] Hence, Spain breached the FET standard.[91]

In Italian ECT cases concerning RES, such representations may also well be made to investors by the State, because it was laid down in relevant decrees and the investors received a 'tariff recognition letter' from the SOE in charge of implementing the support scheme that 'recognized' that the tariff will be 'constant' for twenty years.[92] Also, investors would enter into a written agreement with that SOE that laid down the applicable FIT that was 'constant' for a period of twenty years.[93]

87. Ibid. Para. 590.
88. Ibid. Para. 592.
89. Ibid. Para. 596.
90. Ibid. Para. 599.
91. See also: Award, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 2019. Para. 6.
92. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 127.
93. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Pp. 69-71. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Paras. 127-130.

In light of such circumstances, the *Greentech v. Italy* tribunal held that '[t]he repeated and precise assurances to specific investors amounted to guarantees that the tariffs would remain fixed for two decades.'[94] Thereby, Italy 'effectively waived its right to reduce the value of the tariffs' according to the tribunal.[95] In fact, the tribunal considered the commitments undertaken by Italy *vis-à-vis* foreign investors 'sufficiently specific' to give rise to obligations that are entered into for purposes of the umbrella clause.[96]

Under comparable circumstances, the tribunal in *CEF Energia v. Italy* held that 'a party in the shoes of claimant would be left in no doubt but that it was to receive incentives, in constant currency, for a twenty year period, and all pursuant to private law contracts.'[97] Since these assurances were taken into account by the investor when making the investment, it had the legitimate expectation that the incentives would remain in place.[98] Nevertheless, the tribunal embarked on an exercise of balancing the private and public interests involved in order to analyze whether a breach of the ECT could be established, and eventually found in favour of the former.[99]

Even in the context of regulatory changes in Spain, legal stability claims have been accepted by ECT tribunals, even though the circumstances were not comparable to those of the *Masdar* and *NextEra* cases.[100] In *Novenergia v. Spain* for example, a case decided after the awards from the *Charanne* and *Eiser* cases had already become public, the tribunal accepted the legal stability expectation. In essence, the *Novenergia* tribunal accepted that RD 661/2007 and several documents regarding the Spanish RES scheme – the very same documents as in other Spanish ECT cases – were a credible source to base a legitimate expectations claim on.[101] Notwithstanding that, and contrary to the

94. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 450.
95. Id.
96. Ibid. Paras. 464-467.
97. Award, *CEF Energia B.V. v. Italian Republic*, SCC Case No. 158/2015, 2019. Para. 217.
98. Ibid. Para. 234.
99. Ibid. Paras. 235-247.
100. See also: Decision on Jurisdiction, Liability and Partial Decision on Quantum, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, 2019. Paras. 276 & 310.
101. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Paras. 666-681. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent

Masdar and *NextEra* cases, none of these documents were directed specifically at the investor or its investments, something the tribunal itself would acknowledge in its award.[102]

In a similar vein, in *9REN Holding v. Spain*, the tribunal held that a specific provision of RD 661/2007 constituted a 'specific undertaking' from Spain *vis-à-vis* the investor, notwithstanding the fact that this representation arose from regulatory law and there was no individual representation made to the investor comparable to the *Masdar* and *NextEra* cases.[103] The tribunal subsequently held that these legitimate expectations, which were relied upon when making the investment, were frustrated in violation of the FET standard:[104]

> 'The financial vulnerability of renewable energy projects is the heavy up-front capital costs. Once money is "sunk" in the PV facilities, the funds of the developer (and its bankers) are locked into the FIT contracts with their investments effectively (as the Claimant put it) long-term hostages. If energy prices rise, the benefit accrues to Spain not the operators who, in Spain's view, will recover only what Spain unilaterally declares to be a reasonable return by reference to the bond market. On the other hand, if energy prices fall, Spain claims the right to resile from what the Tribunal has concluded was a regulatory guarantee of price stability. Spain's position is that it alone should benefit from rising prices, but the burden of falling prices is to be off-loaded onto investors. As a matter of Spanish domestic law, such treatment of local investors has been held to be constitutional, but in the Tribunal's view, such one-sided treatment is neither fair nor equitable. Under the ECT, the Claimant, as a foreign investor, was entitled to fair and equitable treatment and in this case did not receive it.'[105]

Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Pp. 81-82.

102. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 715.
103. Award, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, 2019. Paras. 257, 293-297.
104. Ibid. Para. 307.
105. Ibid. Para. 311.

These cases, and the *Masdar v. Spain, NextEra v. Spain, CEF Energia v. Italy,* and *Greentech v. Italy* cases more specifically, demonstrate that the application of the legal stability expectation is thus greatly dependent on the facts of the specific case at hand. Nevertheless, the presence of inconsistencies is once again demonstrated by reference to the *Novenergia* and *9REN Holding* awards, which adopted a significantly broader interpretation of the legitimate expectations doctrine than other ECT tribunals are generally willing to acknowledge.

5.2.4.2. Regulatory Changes Within the Boundaries of FET

The second argument, which is often put forward as an alternative to the legal stability expectation, in essence stresses that the FET standard can still be breached by regulatory changes – even in the absence of a specific representation by the State – when the regulatory changes exceed the boundaries of fairness and equitableness.[106]

In the *Charanne v. Spain* case, the investor had argued that 'the legitimate expectations of the investor [...] are frustrated, even in the absence of specific commitments, when the receiving State performs acts incompatible with a criterion of economic reasonableness, with public interest or with the principle of proportionality.'[107] Although the tribunal would eventually reject the argument, it did accept the rationale of it, by stating that 'an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest.'[108] With regards to proportionality, the tribunal considered 'that this criterion is satisfied as long as the changes are not capricious or unnecessary and do not amount to suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework.'[109] The tribunal considered the FIT and priority dispatch as fundamental characteristics of the support scheme.[110]

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106. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. Pp. 16-17. See for example: Award, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, 2018. Para. 360(7).
107. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 513.
108. Ibid. Para. 514.
109. Ibid. Para. 517.
110. Ibid. Para. 533.

The tribunal in the *Blusun v. Italy* case would comment on the standard of review proposed by the *Charanne* tribunal as the *Charanne* case was the first ECT RES dispute to be decided on the merits. Interestingly the *Blusun* tribunal, which would eventually dismiss all claims on the merits, quite openly criticized the proposed standard of review:

> "Of the three criteria suggested in *Charanne*, 'public interest' is largely indeterminate and is, anyway, a judgement entrusted to the authorities of the host state. Except perhaps in very clear cases, it is not for an investment tribunal to decide, contrary to the considered view of those authorities, the content of the public interest of their state, nor to weigh against it the largely incommensurable public interest of the capital- exporting state. The criterion of 'unreasonableness' can be criticized on similar grounds, as an open-ended mandate to second-guess the host state's policies. By contrast, disproportionality carries in-built limitations and is more determinate. It is a criterion which administrative law courts, and human rights courts, have become accustomed to apply to governmental action."[111]

Rather, the *Blusun* tribunal held that '[i]n the absence of a specific commitment, the State has no obligation to grant subsidies such as feed-in-tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial sources on the basis of the earlier regime.'[112] The *Blusun* tribunal thus proposes a proportionality test.

The first ECT RES case where the boundaries of fairness and equitableness were crossed would come in 2017 in the *Eiser v. Spain* case, which held that:

> "[…] Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by

111. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 318.
112. Ibid. Para. 319.

> investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. [...] However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment's value."[113]

In this case, the investors' investments deviated from the hypothetical standard employed by the Spanish authorities to determine the FIT. Therefore, the tribunal considered that the new regime retroactively prescribed design standards with regards to facilities that were built years before.[114] As a consequence of the regulatory changes, revenues went down by 66 percent.[115] In light of these factual circumstances, the tribunal considered that Spain had violated the FET standard.

The standard of review from the *Eiser* tribunal, as quoted above, received the approval of the *Antin v. Spain* tribunal in 2018.[116] The *Antin* tribunal likewise found a violation of the FET standard since the remuneration methodology applied to Antin's investment was not based on 'any identifiable criteria' but rather depended on governmental discretion.[117] This was contrary to the previous regime, which did make use of identifiable criteria for purposes of remuneration.

The *Eiser* standard of review also received the approval of the *Foresight v. Spain* tribunal.[118] The tribunal would establish that the 2013-2014 measures introduced by Spain were in violation of the FET standard because they 'did not merely modify the fixed FIT's […] rather, it introduced a number of fundamental changes to the support scheme.'[119] The changes were so fundamental that they 'crossed

113. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 382. This paragraph was partially referred to in *Cube Infrastructure v. Spain*: Decision on Jurisdiction, Liability and Partial Decision on Quantum, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, 2019. Para. 354.
114. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 414.
115. Ibid. Para. 151 & 417.
116. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 532.
117. Ibid. Para. 568.
118. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Paras. 359, 365, 385 & 388.
119. Ibid. Para. 390.

the line from a non-compensable regulatory measure to a compensable breach of the FET standard in the ECT.'[120]

The *Eiser* approach likewise received the approval of the *RREEF v. Spain* tribunal.[121] It held that investors could expect that any changes to FIT's would be 'reasonable and equitable.'[122] The tribunal in this case found that the investors could only have a legitimate expectation to receive a 'reasonable rate of return' rather than a general legitimate expectation of regulatory stability.[123]

The standard of review of *Eiser v. Spain* has not gone completely uncontested, however. In *Novenergia v. Spain*, the tribunal did not agree with the finding of the *Eiser* tribunal that a deprivation of value has to have taken place:

> "The Tribunal disagrees with the approach adopted by the arbitral tribunal in *Eiser*, […]. In the Tribunal's view, the assessment of whether the FET standard has been breached is a balancing exercise, where the state's regulatory interests are weighed against the investors' legitimate expectations and reliance. It is not simply sufficient to look at the economic effect that the challenged measures have had. Destruction of the value of the investment is clearly determinative in the assessment of whether a state has breached Article 13 [Expropriation] of the ECT, but it is but one of several factors to consider when determining whether a state has breached Article 10(1) of the ECT. Nevertheless, in the Tribunal's opinion, the economic effect on a claimant's investment is an important factor in the balancing exercise pursuant to Article 10(1) as well, as it can go towards showing a change in the essential characteristics of the legal regime relied upon by investors in making long-term investments."[124]

120. Ibid. Para. 398.
121. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Paras. 314 & 316.
122. Ibid. Para. 399.
123. Id.
124. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 694.

Instead, because the Spanish measures were so 'radical and unexpected' that they 'fell outside the acceptable range of legislative and regulatory behaviour' since they 'entirely transform[ed] and alter[ed] the legal and business environment under which the investment was […] made', the consequential 'significant damaging economic effect' on the investment sufficed to establish a violation of the FET standard.[125] By requiring 'significant damaging economic effect' instead of a deprivation of value, one could argue that the threshold of liability is lower under the *Novenergia* approach.[126]

That the effects of regulatory changes on the economic viability of an investment can be a relevant consideration in RES ECT cases is also confirmed by the *PV Investors v. Czech Republic* cases. In these cases, the investors were still making 'a more than reasonable return' which confirmed the tribunal in its conclusion.[127]

5.2.4.3. Observations

On the basis of the awards discussed above a few observations can be drawn. Firstly, they make clear that the ECT allows investors to obtain redress for violations of the ECT. In the absence of a specific commitment to the contrary, the FET standard does not preclude regulatory modifications to existing support schemes provided that these do not amount to the elimination of fundamental characteristics of support schemes, such as FIT's or the privilege of priority dispatch. Given the fact that many investments in the RES sector depend on such support, this is a highly relevant conclusion for RES investors. Secondly, these cases also demonstrate that the more specific a right to a FIT is – for example when it is laid down in a contract – the more likely it is that regulatory changes in violation of such commitments will amount to a violation of the ECT. This means that RES investors in for instance Italy and the UK, where FIT contracts are being concluded with investors, are better protected against regulatory changes than

125. Ibid. Para. 695. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 20.
126. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 20.
127. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 536. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 490. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 494. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 577.

RES investors in States were financial support is granted on the basis of a general legal framework, such as Spain.

However, as these awards also demonstrate, tribunals do not necessarily agree on the applicable standard of review, which adversely affects the predictability of the application of the ECT. Therefore, in order for the ECT to fulfil its object of mitigating investment risks, it is desirable that the investment protection standards become more predictable.[128]

5.2.5. Recent Treaty Practice

As stated earlier, as a reaction to the sometimes expansive interpretations given to FET standards, States have started to limit the level of investment protection by better describing the content of the standard. It seems that some of the RES investment cases have also triggered a reaction. For example, Art. 9.6(5) CPTPP, which contains the CPTPP's FET standard, states:

> "For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."

In a very similar vein, Arts. 8.9(3) and (4) CETA, that precedes CETA's FET standard, state:

> "3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy:
>
> (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
>
> (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach of the provisions of this Section.

128. Cees Verburg, 'Modernizing the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement [2019] 20(2-3) Journal of World Investment & Trade 425.

> 4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor."

In a footnote to the final paragraph quoted above it is clarified that with regard to the EU, a 'subsidy' includes state aid 'as defined in its law' and that the European Commission should be considered as a competent authority in accordance with Art. 108 of the Treaty on the Functioning of the European Union (TFEU).

One could consider the CETA provision a reaction to two types of investment cases.

First of all, these provisions seem to be related to the RES investment cases where reduced government support is at the heart of the dispute. These provisions can have clear implications for RES investors seeking investment protection on the basis of these IIA's since the level of investment protection is reduced. In that regard, the CETA leaves more room for for successful claims by RES investors than the CPTPP. In the RES case *Blusun v. Italy,* the tribunal held that:

> "In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime."[129]

Although this statement does not contain a reference to either CETA or the CPTPP, its language does show some similarity with the treaty innovations in the more recent two agreements.

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129. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 372.

Secondly, the CETA provision seems to address certain controversial aspects of investment cases allegedly involving EU State aid rules, such as *AES v. Hungary, Electrabel v. Hungary, EDF v. Hungary,* and *Micula v. Romania*.[130] In that regard, it is of interest to note that early versions of the ECT did contain a provision concerning State aid, although the current text does not mention it.[131] Also, in pending ECT RES disputes involving Spain and the Czech Republic, investors complain about regulatory changes to RES support schemes that were not notified to the European Commission in accordance with EU State aid rules. Consequently, the European Commission has already stated that it considers any damages that are to be awarded in ECT arbitration as notifiable State aid pursuant to Art. 108(3) TFEU.[132] This may make the enforcement of an award difficult, if not impossible, in the EU.[133]

5.3. MOST CONSTANT PROTECTION AND SECURITY

The third sentence of Art. 10(1) ECT contains two obligations, the first one is the obligation that 'investment shall also enjoy the most constant protection and security' (MCPS). The origin of the MCPS standard dates back to at least the eighteenth century.[134] Like the FET standard, the MCPS obligation has been

130. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Award, *EDF International S.A. v. Republic of Hungary*, UNCITRAL, 2014. Final Award, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, 2013.
131. See for example, Article 31, Draft Basic Agreement, 31 October 1991. <https://energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/3_-_BA_4__31.10.91_.pdf> accessed on 07/02/2019. This provision provided for the following: 'State aid should not be granted when it would distort competition in trade between the Contracting Parties. Deatiled provisions implementing the principles and defining the circumstances in which state aid is permitted shall be included in appropriate Protocols.'
132. European Commission, State aid SA.40348 (2015/NN) — (Spain) Support for electricity generation from renewable energy sources, cogeneration and waste, C(2017) 7384 final, 10/11/2017. Para. 165.
133. Judgment, *Ioan Micula, S.C. Multipack S.R.L., S.C. European S.A., S.C. Starmill S.R.L., Viorel Micula v. Romanian Ministry of Public Finance,* District Court Nacka, Case No. Ä 2550-17, 2019. *Viorel Micula, Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., S.C. Multipack S.R.L. v. Romania* [2017] EWHC 31, High Court of Justice England. *Viorel Micula, Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., S.C. Multipack S.R.L. v. Romania* [2018] EWCA Civ 1801, Court of Appeal England. Lucian Ilie & Amy Seow, '*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013' [2017] 2 European Investment Law and Arbitration Review 151.
134. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010).

formulated differently across IIA's. As observed by Salacuse, MCPS provisions as laid down in the ECT fail to provide answer to 'three difficult but essential questions.'[135] Namely, i) against whom should the investment be protected?; ii) against what action or whom is the host State supposed to provide protection?; and iii) when do measures of the host State fall short of its obligation to provide security and protection?[136]

5.3.1. Legal Comparison of IIA's

The obligation to provide MCPS can be found in many IIA's. However, the wording often differs. The very first BIT, concluded between Germany and Pakistan, merely stated that investments of either Party 'shall enjoy protection and security in the territory of the other Party.'[137] Perhaps the most common formulation nowadays calls for 'full protection and security.'[138] It has been argued that these broad provisions could include both physical and legal protection and security.[139] In addition, there are provisions that refer specifically to 'full physical security and protection' and those that refer to 'full legal protection and full legal security.'[140] Also, there are IIA's that initially contain the 'full protection and security' standard, but which subsequently specify the content of this obligation. The CPTPP, for example, clarifies that 'full protection and security' does not require treatment beyond the requirements of customary international law as well as that each Party has 'to provide the level of police protection required under customary

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Pp. 208 & 218. See for example: Article 14, Treaty of Amity, Commerce and Navigation between His Britannick Majesty and The United States of America (United States of America-United Kingdom) (adopted 19/11/1794, entered into force 29/2/1796).

135. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 208.
136. Id.
137. Article 3(1), Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Germany-Pakistan) (adopted 25/11/1959, entered into force 28/04/1962).
138. Article 4(1), Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment (Japan-Colombia) (adopted 12/09/2011, entrance into force still pending). Article 1105(1), North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994).
139. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 162-165.
140. Article 3(2), Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Nigeria (Netherlands-Nigeria) (adopted 02/11/1992, entered into force 01/02/1994). Article 4(1), Treaty Between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments (Germany-Argentina) (adopted 09/04/1991, entered into force 08/11/1993).

international law.'[141] Similar provisions can be found in various BIT's concluded by the US and Canada, and various Model BIT's.[142] The CETA provides that 'full protection and security' refers to 'the Party's obligations relating to the physical security of investors and covered investments.'[143]

Besides the phrasing of the provision, other differences can be distinguished. There are, for example, quite a few provisions where the MCPS obligation is mentioned as 'a specification' of the FET standard.[144] There are also provisions

141. Articles 9.6(1) & (2)(b), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018).
142. Article 6, Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (Canada-Hong Kong) (adopted 10/02/2016, entered into force 06/09/2016). Article II, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (Canada-Latvia) (adopted 05/05/2009, entered into force 24/11/2011). Article 6, Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada-Mali) (adopted 28/11/2014, entered into force 28/11/2014). Article 5, Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (Canada-Peru) (adopted 14/11/2006, entered into force 20/06/2007). Article 6, Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (Canada-Senegal) (adopted 27/11/2014, entered into force 05/08/2016). Article III, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada-Slovakia) (adopted 20/07/2010, entered into force 14/03/2012). Article 6, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (Canada-Serbia) (adopted 01/09/2014, entered into force 27/04/2015). Article 5, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Article 5, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012). See also: Article 5, Norway Draft Model BIT, 2015. Article 4, Mexico Model BIT, 2008. Article 7, Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco-Nigeria) (adopted 03/12/2016, entrance into force still pending).
143. Articles 8.10(1) & (5), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
144. Giuditta Cordero Moss, 'Full Protection and Security' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 133. Article 8.10(1), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Article 2.5(1) & (5), EU-Vietnam Investment Protection Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending). Article 3(2), Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech Republic (Netherlands-Czech Republic) (adopted 29/04/1991, entered into force 01/10/1992). Article 3(2), Agreement Between the Kingdom of the Netherlands and the Republic of

where the MCPS obligation is a separate standard.[145] Finally, there are also combinations where a link is made to either 'public international law' or 'customary international law.'[146]

As one can see, the deviations in the phrasing are plentiful. However, in comparison to the FET standard, it has been argued that where the FET standard primarily deals with the decision-making process, the obligation to provide the MCPS is more concerned with 'failures by the State to protect the investor's property from actual damage caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence.'[147] Good illustrations are cases like *AMT v. Zaire, Wena Hotels v. Egypt*, and *AAPL v. Sri Lanka,* that all concerned the destruction of property during internal armed conflicts, riots, or other acts of violence.[148]

It is generally recognized that the standard of liability is one of due diligence and not of strict liability.[149] As held by the ICJ in the *ELSI* case, the MCPS standard

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Poland on Encouragement and Reciprocal Protection of Investments (Netherlands-Poland) (adopted 07/09/1992, entered into force 01/02/1994). Article 2(2), Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of El Salvador for the Promotion and Protection of Investments (United Kingdom-El Salvador) (adopted 14/10/1999, entered into force 01/12/2000).

145. Article 2(3), Agreement Between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments (Belgium/Luxembourg-China) (adopted 06/06/2005, entered into force 01/12/2009). Article 2(2), Agreement Between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (China-Germany) (adopted 01/12/2003, entered into force 11/11/2005).
146. Article II(a), Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (United States-Argentina) (adopted 14/11/1991, entered into force 20/10/1994). Article II(2)(a), Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (United States-Ecuador) (adopted 27/08/1993, entered into force 11/05/1997). Articles 5(1) & (2), US Model BIT, 2012.
147. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press 2007). P. 247. Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). P. 171.
148. Ibid. P. 248. Award, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, 1997. Paras. 6.09-6.14. Award, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 2000. Paras. 80-85. Final Award, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 1990. Paras. 85-86.
149. Award, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, 2014. Para. 430. Award, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, 2005. Para. 164. Award, *MNSS B.V. and Recupero Credito Acciaio*

'cannot be construed as giving of a warranty that property shall never in any circumstances be occupied or disturbed.'[150] It is 'an obligation of means' and not one of result although a State cannot absolve its international liability by arguing a lack of resources.[151]

Concerning the substantive protection offered by the MCPS standard, it protects first and foremost against physical violence and harassment by either government officials or a third party, as evidenced by cases such as *AAPL v. Sri Lanka* and *AMT v. Zaire*.[152]

However, it is possible that the MCPS obligation extends beyond physical security, especially when it is qualified by 'full' and 'no other adjective or explanation.'[153] With regards to the obligation to provide legal security and protection, one can think of the obligation of the host State to provide access to the judicial system.[154]

The *CME v. Czech Republic* tribunal went a step further when it held that the host State is obliged 'to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection

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N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, 2016. Para. 351. Final Award, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 1990. Paras. 45-48. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 217. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 161-162. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration – Substantive Principles* (Oxford University Press 2007). P. 250. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 361.

150. *Elettronica Sicula S.P.A. (ELSI) (United State of America v. Italy),* Judgment, I.C.J. Reports 1989, p. 15. Para. 108.
151. Award, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, 2009. Paras. 71-82. Giuditta Cordero Moss, 'Full Protection and Security' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 139.
152. Award, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, 1997. Paras. 6.09-6.14. Award, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, 2000. Paras. 80-85. Final Award, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 1990. Paras. 85-86. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 162-163. Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). P. 171. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 361.
153. Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Paras. 406-408.
154. Final Award, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, 2001. Para. 314.

of the foreign investor's investment withdrawn or devalued.'[155] In this case, the Czech media regulatory body had created a legal situation in which the local partner of CME could terminate a contract that was essential to the investment, by virtue of which the Czech Republic violated the obligation to provide full security and protection.[156] It has to be noted, however, that in the factually comparable *Lauder v. Czech Republic* case, which was almost simultaneously decided with the *CME* case, the tribunal reached the opposite conclusion.[157]

In the *Siemens v. Argentina* case, the tribunal also adopted an interpretation that was wider than merely physical protection.[158] However, in the applicable BIT between Germany and Argentina, the term 'security' was qualified by 'legal', which justifies such an interpretation.[159]

Perhaps the most expansive interpretation given to a MCPS standard was given by the *Biwater Gauff v. Tanzania* tribunal, which held that when 'the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal.'[160] One could consider this reference to 'commercial security' as an expansive interpretation.

5.3.2. ECT Arbitral Practice

The MCPS standard has been addressed by various ECT tribunals. Several of these have endorsed the view that the obligation under this standard is one of

155. Partial Award, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, 2001. Para. 613.
156. Id.
157. Final Award, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, 2001. Paras. 305-314. This case was decided on the basis of another treaty, however.
158. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 303.
159. Article 4(1), Treaty Between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments (Germany-Argentina) (adopted 09/04/1991, entered into force 08/11/1993).
160. Award, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 2008. Para. 729.

due diligence.[161] Therefore, the standard is not one of strict liability.[162] This means that host States must take 'reasonable steps to protect […] investors' while there is no obligation to 'prevent each and every injury.'[163] According to the *Electrabel* tribunal, 'the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is "reasonable" or "due," depends in part on the circumstances.'[164] The *Plama* tribunal held that the obligation is one of 'vigilance', which means that a State must take 'all measures necessary' to fulfil obligations and that a State may not be allowed to 'invoke its own legislation to detract from any such obligation.'[165]

The MCPS standard of the ECT provides first and foremost for physical security and protection.[166] According to the tribunal in the *Liman Caspian Oil v. Kazakhstan* case, the purpose of the standard is 'to protect the integrity of an investment

161. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 179. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 13.3.2. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Paras. 821-822. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.83.
162. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 181. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 13.3.2. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 821. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 246.
163. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 13.3.2. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.83. Award, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 2011. Para. 523.
164. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.83. Award, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 2011. Para. 523.
165. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 179.
166. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 180. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 13.3.2. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 246. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 289.

against interference by the use of force and particularly physical damage.'[167] The *AES v. Hungary* tribunal held that a State should take reasonable steps or enable an investor to take such steps against 'harassment by third parties and/or State actors.'[168] The obligation thus covers damage caused by State and non-State actors.

Several ECT tribunals have also addressed the notion of legal security.[169] According to the *Plama* tribunal, claims regarding legal security become closely related to the notion of the FET standard although another ECT tribunal held that the MCPS standard must have a 'meaning beyond, and distinct from,' the FET standard.[170] According to the *Mamidoil* and *Electrabel* tribunals, the principles of treaty interpretation – must notably the *'effet utile'* rule – require that a different scope and role must be given to the MCPS and the FET standards.[171]

With regards to legal security, the *AES v. Hungary* case is of particular interest. The claimant in this case had argued that the introduction of a new pricing regime for electricity resulted in price cuts of 35 and 43 percent in comparison to an earlier Power Purchasing Agreement (PPA) that was terminated by Hungary.[172] AES argued that the MCPS provision of the ECT was breached by Hungary because the implementation of the new pricing regime had 'substantially devalued their investment' while the previous pricing method was based on contractual arrangements.[173] The tribunal, however, rejected these claims and held that the security provision 'can, in appropriate circumstances, extend beyond a protection of physical security, it certainly does not protect against a State's right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the State acts reasonably

167. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 289.
168. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 13.3.2.
169. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 246.
170. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 180. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 289.
171. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 819. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.83.
172. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 4.24.
173. Ibid. Para. 13.1.2.-13.1.3.

in the circumstances and with a view to achieving objectively rational public policy goals.'[174] Therefore, the tribunal refused to accept an argument that essentially claims that no change in law may take place which adversely affects the value of the investment since this would be 'practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.'[175]

Thus, according to the *AES* tribunal, the MCPS standard does not provide legal protection against regulatory changes that adversely affect an investment when such changes are reasonable in the circumstances and pursue an objectively rational public policy goal.

In the factually comparable *Electrabel v. Hungary* case, the claimant argued that the standard was breached because Electrabel's Hungarian subsidiary had suffered a 34 percent price reduction due to a new pricing regime which violated Hungary's international obligations because it had failed to 'take positive steps to protect Electrabel's investment and to prevent infringements of Electrabel's rights by the operation of law.'[176]

The analysis of the *Electrabel* tribunal deviates from the analysis in the *AES* case because it does not focus on the issue of whether a substantive change in the regulatory framework would violate the MCPS standard, but it rather focusses on the availability of tools for obtaining redress for such changes.[177] The tribunal concluded that such tools were provided for by Hungary since it provided for means by which Electrabel's Hungarian subsidiary could settle its contractual PPA disputes with the State-Owned Enterprise (SOE) to which it supplied the generated electricity.[178] Moreover, any disputes between Electrabel and Hungary could be settled in various ways, including those provided for by Art. 26 ECT.[179]

The *Electrabel* and *AES* tribunals thus adopt a rather different approach when examining the MCPS standard in cases where the facts are comparable. While the *AES* tribunal focusses on the question of whether the substantive legal

174. Ibid. Para. 13.3.2.
175. Ibid. Para. 13.3.5.
176. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.81.
177. Ibid. Para. 7.146.
178. Id.
179. Id.

environment may change in such a way as to adversely affect the investment, the *Electrabel* tribunal adopts a less intrusive and more formalistic approach by merely focusing on the possible avenues that are available to the investor to obtain redress in case such regulatory changes occur. Depending on the margin of appreciation accorded to the host State by a tribunal, the *AES* approach is potentially more invasive in the regulatory freedom of the State.

5.3.3. Relevance for Renewable Energy Investors

The MCPS standard may first of all provide protection against physical damage caused by State and non-State actors. However, the author is not aware of any situations of damage caused by insurgents to RES facilities comparable to, for example, the problems faced by international oil companies in the Niger Delta in Nigeria where facilities are regularly attacked by local militants. Nevertheless, it has to be noted that developers and contractors of onshore windfarms in the Netherlands have received threats from local opponents.[180] Thus far, this has resulted in contractors withdrawing from proposed projects.[181]

At present it nevertheless seems more likely that RES investors appeal to the notion of legal security and protection. It has to be noted, however, that the existence of an obligation to provide legal protection was put in question by the *Liman Caspian Oil* tribunal, which held that the standard 'does not extend to any contractual rights but whose purpose is rather' to protect the physical integrity of the investment.[182]

By reference to the non-ECT *CME v. Czech Republic* case, RES investors could argue that statutory or regulatory changes to a legal framework may be in breach of the MCPS standard if these amendments fundamentally alter the legal landscape in which the RES facility operates.[183] It has been said that the

180. See for example: RTL Nieuws, 'Vierde Dreigbrief Windmolenactivisten: 'Uw Onderneming Wordt Vogelvrij Verklaard' (RTL Nieuws, 2019). <https://www.rtlnieuws.nl/nieuws/nederland/artikel/4679071/weer-dreigbrief-over-windmolenpark-opgedoken> accessed on 14/06/2019.
181. Bastiaan Nagtegaal, 'Drents Bouwbedrijf Stapt uit Windpark na Bedreiging van Activisten' (NRC, 2019). <https://www.nrc.nl/nieuws/2019/03/27/drents-bouwbedrijf-stapt-uit-windpark-na-bedreiging-van-activisten-a3954739> accessed on 26/07/2019.
182. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 289.
183. Partial Award, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, 2001. Para. 613.

approach of the *CME* tribunal has been followed in a considerable number of cases.[184]

An example of cases where the host State may have failed to provide legal security and protection are the currently pending ECT cases against Bulgaria, which are related to RES.[185] Claimants in these cases are not renewable energy producers, however, but rather investors that invested in the electricity distribution grids of Bulgaria. Under Bulgarian law, the Distribution System Operator (DSO) has to 'absorb' the costs of the FIT offered to RES investors under Bulgarian legislation.[186] To offset these costs, some of the DSO's tried to pass these costs on to the consumer which lead to increased energy tariffs.[187] These increased costs caused mass protests against high energy bills.[188] This forced the national regulator to reduce the tariffs, primarily at the expense of the DSO's.[189] Under such circumstances, an investor can argue that Bulgaria failed to provide legal protection and security since it is forced – by law – to incur the costs associated with RES generation while the energy regulator does not provide enough room to pass these costs on to consumers.

5.4. NON-IMPAIRMENT STANDARD

The third sentence of Art. 10(1) ECT also contains the obligation that contracting parties shall not 'impair by unreasonable or discriminatory measures the

184. Ralph Alexander Lorz, 'Protection and Security (Including the NAFTA Approach)' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 784. See for example: Award, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, 2004. Para. 170. Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Para. 408.
185. *EVN AG v. Republic of Bulgaria,* ICSID Case No. ARB/13/17. *ENERGO-PRO a.s. v. Republic of Bulgaria*, ICSID Case No. ARB/15/19. *ČEZ, a.s. v. Republic of Bulgaria*, ICSID Case No. ARB/16/24.
186. Daniel Behn & Ole Kristian Fauchald, 'Governments under Cross-Fire? Renewable Energy and International Economic Tribunals' [2015] 12 Manchester Journal of International Economic Law 117. P. 136. Article 31, Energy from Renewable Sources Act, Bulgaria (2011).
187. Daniel Behn & Ole Kristian Fauchald, 'Governments under Cross-Fire? Renewable Energy and International Economic Tribunals' [2015] 12 Manchester Journal of International Economic Law 117. P. 136.
188. Reuters, 'EVN Prepares Legal Action on Bulgarian Electricity Dispute' (*Reuters,* 19/03/2013) <http://www.reuters.com/article/austria-evn-bulgaria-idUSL6N0CB6DU20130319> accessed on 03/11/2016.
189. Id. Daniel Behn & Ole Kristian Fauchald, 'Governments under Cross-Fire? Renewable Energy and International Economic Tribunals' [2015] 12 Manchester Journal of International Economic Law 117. P. 136.

management, maintenance, use, enjoyment or disposal' of investments. This provision will be referred to as the 'non-impairment' standard.

5.4.1. Legal Comparison of IIA's

In this paragraph a legal comparative analysis of the non-impairment obligation will be provided. After some general remarks, the elements 'unreasonable' and 'discriminatory' will be examined more in-depth to establish the level of investment protection as provided for by these elements.

The provision that protects investors against unreasonable or discriminatory measures is one that is often found in BIT's, although it is absent in some well-known IIA's such as the NAFTA, CPTPP, and CETA.[190] The language used to describe this standard, however, varies. For example, where the first element of the ECT standard – like many other IIA's – refers to 'unreasonable' measures, other IIA's refer to 'arbitrary' or 'unjustifiable' measures.[191] However, there is

190. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 191. Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 87. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 790.

191. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 792. For treaties that refer to 'unreasonable' see: Article 3(2), Agreement Between the Government of the Republic of Austria and the Government of the Republic of Armenia for the Promotion and Protection of Investments (Austria-Armenia) (adopted 17/10/2001, entered into force 01/02/2003). Article 2(2), Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech Republic and Slovak Federal Republic for the Promotion and Protection of Investments (United Kingdom-Czech Republic) (adopted 11/07/1990, entered into force 26/10/1992). Article 3(1), Agreement Between the Government of the People's Republic of China and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments (China-Argentina) (adopted 05/11/1992, entered into force 01/08/1994). For treaties that refer to 'arbitrary' see for example: Article II(2)(b), Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (Argentina-United States of America) (adopted 14/11/1991, entered into force 20/10/1994). Article 2(3), Treaty Between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investments (Germany-Argentina) (adopted 09/04/1991, entered into force 08/11/1993). Article 2(2), Treaty Between the Federal Republic of Germany and the Republic of Botswana concerning the Encouragement and Reciprocal Protection of Investments (Germany-Botswana) (adopted 23/05/2000, entered into force 06/08/2007). For treaties that refer to 'unjustifiable', see for example: Article 4(2), Agreement Between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments (Australia-Argentina) (adopted 23/08/1995, entered into force 11/01/1997). Article 2(4), Agreement Between the Government of the Republic

jurisprudence that accepts that the meaning of these different words is essentially the same.[192] The second element of the non-impairment standard – discriminatory – is used in a more uniform manner.

The fact that the elements 'unreasonable' and 'discriminatory' are linked by the conjunction 'or' indicates that the obligation is disjunctive and that only one of the two elements has to be breached in order to establish a violation of the standard.[193]

Another notable difference between various IIA's is that in some treaties the non-impairment standard can be found in a separate provision, while in other IIA's it is combined in the same provision as either the FET standard or the MCPS obligation, or it is a combination of both.[194] This may raise issues concerning

of Bulgaria and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments (Bulgaria-Argentina) (adopted 21/09/1993, entered into force 11/03/1997).

192. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184. Award, *National Grid plc v. The Argentine Republic*, UNCITRAL, 2008. Para. 197. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 191. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 792-793.

193. Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Para. 391. Award, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, 2009. Para. 457. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 793-794. Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 87. Veijo Heiskanen, '"Unreasonable and Discriminatory Measures" as a Cause of Action under the Energy Charter Treaty' [2007] 10 International Arbitration Law Review 104. P. 107.

194. In the ECT, for example, it can be found in Art. 10(1), which includes both the FET standard and the most constant security and protection obligation. This is in line with the policy of the Netherlands. See for example: Article 3(1), Netherlands Model BIT, 2004. Article 3(1), Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of Cambodia and the Kingdom of the Netherlands (Cambodia-Netherlands) (adopted 23/06/2003, entered into force 01/03/2006). In many Austrian BIT's, the non-impairment standard is often contained in a separate provision. See: Article 3(2), Austria Model BIT, 2008. Article 2(2), Agreement Between the Republic of Chile and the Republic of Austria for the Promotion and Reciprocal Protection of Investment (Chile-Austria) (adopted 08/09/1997, entered into force 22/10/2000). The Australia-Argentina BIT is an example of an IIA where the non-impairment obligation is combined with the full protection and security obligation: Article 4(2), Agreement Between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments (Australia-Argentina) (adopted 23/08/1995, entered into force 11/01/1997). The Argentina-Finland BIT combines the non-impairment obligation with the FET standard:

overlap of the various standards. For example, in the ECT case *Plama v. Bulgaria,* the tribunal acknowledged that the FET standard and the non-impairment obligation 'can overlap on certain issues' but that 'they can also be defined separately.'[195] Nevertheless, there are also investment cases where the tribunal considered the overlap between the FET and non-impairment standards so significant that it considered that there is essentially no difference in meaning.[196] This was for example the opinion of the tribunal in the *Saluka v. Czech Republic* case, where the applicable IIA, the Netherlands-Czech Republic BIT, contained a provision incorporating both the FET and non-impairment standards in the same sentence.

A survey by Kriebaum reveals that both approaches have received significant support in practice, with almost an equal number of tribunals considering the FET and non-impairment standard separately as different standards and considering the non-impairment standard as part of the FET standard.[197]

Nevertheless, as pointed out by Schreuer and Kriebaum, there may be good reasons to examine both standards separately since it is illogical that treaty drafters would incorporate different obligations with exactly the same meaning.[198] This point of view is also in line with the general rules of treaty interpretation, more specifically the rule of effectiveness.[199] According to the Appellate Body of the WTO, for example, 'interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result

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Article 2(2), Agreement Between the Government of the Republic of Finland and the Government of the Republic of Argentina on the Promotion and Reciprocal Protection of Investments (Finland-Argentina) (adopted 05/11/1993, entered into force 03/05/1996).

195. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184.
196. Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Para. 460.
197. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 794-797. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 412.
198. Ibid. P. 797. Christoph Schreuer, 'Protection against Arbitrary or Discriminatory Measures' in Catherine A. Rogers *et al* (eds.), *The Future of Investment Arbitration* (Oxford University Press 2009). P. 192.
199. Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Buttersworths 2011). P. 124. Jean-Marc Sorel & Valerie Bore Eveno, 'Article 31 of the 1969 Vienna Convention: General Rule of Interpretation' in Olivier Corten *et al, The Vienna Convention on the Law of Treaties* (Oxford University Press 2011). P. 818.

in reducing whole clauses of paragraphs of a treaty to redundancy or inutility.'[200] Thus, while there may well be overlap between the different standards, they should also be considered and applied separately.[201]

The following paragraphs will examine the elements 'unreasonable' and 'discriminatory' more in-depth.

5.4.1.1. Unreasonable Measures

Like most IIA's, the ECT does not provide a definition of the notion of 'unreasonable.' As a consequence of the vagueness of the notion of 'unreasonable', investment tribunals have been struggling to give content and meaning to this term.[202] As put forward by Heiskanen, two different approaches have emerged in practice.[203]

The first approach is referred to as the 'I know it when I see it' approach by Heiskanen. Under this approach a measure is 'unreasonable' or 'arbitrary', terms that are often used interchangeably by investment tribunals, when it does not pass the test as laid down by the ICJ in the *ELSI* case.[204] According to the ICJ, a measure is arbitrary when it opposes, not so much '*a* rule of law' but rather '*the* rule of law' and when the measure willfully disregards due process of law and 'shocks, or at least surprises a sense of judicial propriety.'[205] Thus, for a measure to be 'unreasonable' or 'arbitrary' it has to, first, disregard due process and, second, it has to shock, or at least surprise a sense of judicial propriety.[206] This

200. Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, 1996. P. 23. Reports of the Appellate Body, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1996. P. 12.
201. Christoph Schreuer, 'Protection against Arbitrary or Discriminatory Measures' in Catherine A. Rogers *et al* (eds.), *The Future of Investment Arbitration* (Oxford University Press 2009). P. 192. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 797.
202. Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 101.
203. Ibid. Pp. 101-106.
204. Ibid. Pp. 101-103. *Elettronica Sicula S.P.A. (ELSI) (United State of America v. Italy),* Judgment, I.C.J. Reports 1989, p. 15. Para. 128. In the ECT case *Plama v. Bulgaria,* the tribunal used the terms 'unreasonable' and 'arbitrary' interchangeably. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184.
205. *Elettronica Sicula S.P.A. (ELSI) (United State of America v. Italy),* Judgment, I.C.J. Reports 1989, p. 15. Para. 128.
206. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 799.

test, or approaches based thereon, have been applied by various investment tribunals based on different IIA's.[207] According to Heiskanen this approach has both advantages and disadvantages. On the one hand, this approach is flexible and arbitrators will merely have to apply the *ELSI* test to the facts of the case and the evidence produced without having to venture into the difficult exercise of providing doctrinal insight into the meaning of 'unreasonable' or 'arbitrary.'[208] On the other hand, this also means that the non-impairment obligation will always be fact-dependent and examined on a case-by-case basis.[209]

The second approach, which Heiskanen refers to as the 'due process approach', provides for a more invasive substantive test: it requires both a rational policy to be put forward by the respondent and a reasonable relationship between the implemented measure and the policy that is being pursued.[210] This approach has been adopted by various investment tribunals and seems to be the prevailing approach in ECT arbitration.[211] An advantage of this approach is that it provides a method to examine the compatibility of the national measures with the international obligations of the State concerned in a more objectified and

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207. See for example: Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Para. 392. Award, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, 2005. Paras. 177-178. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 318. Award*, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, 2008. Para. 378. Award, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, 2007. Para. 281. Award, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, 2007. Para. 318. Award, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 2001. Para. 371. Final Award, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, 2001. Para. 232.
208. Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 103.
209. Id.
210. Ibid. Pp. 103-104. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 800-801. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 328.
211. ECT tribunals: Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184. It has to be noted that the *Plama* tribunal seems to make reference to some elements that can be related to the *ELSI* test. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 10.3.7. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Para. 791. Non-ECT tribunals: Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Paras. 460-461. Decision on Liability, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, 2006. Paras. 156-158.

generalized manner.[212] However, especially the second element of the test – whether there is a reasonable relationship between the measure and the policy pursued – places a lot of power in the hand of investment tribunals.[213] One could consider this almost as a 'proportionality test' which could have implications for the margin of appreciation of State conduct, especially if the test is strictly applied.[214]

5.4.1.2. Discriminatory Measures

It has been said that customary international law does not contain a prohibition on discrimination.[215] Therefore, before an investor can successfully argue the contrary, it has to be able to invoke a treaty provision which does establish a prohibition on discrimination.[216]

At first sight, the prohibition on discriminatory measures overlaps with the NT and MFN obligations contained in Art. 10(7) ECT that protect investors against discrimination *vis-à-vis* domestic and other foreign investors from third countries.[217] However, where the NT and MFN obligations primarily concern discrimination based on nationality, the non-impairment obligation contains an arguably broader discrimination prohibition, that includes other grounds for discrimination as well.[218]

It is generally acknowledged in practice that discriminatory intent is not a prerequisite to establish discrimination under international law; all that is required

212. Veijo Heiskanen, 'Arbitrary and Unreasonable Measures' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 105.
213. Ibid. Pp. 105-106.
214. Id. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 801.
215. Award, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 2001. Para. 368. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 196.
216. Id.
217. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 797. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 117.
218. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 802.

is that there is a discriminatory effect, 'either through the action of State organs or the law.'[219]

Concerning the definition of discrimination, the tribunal in the *Lemire v. Ukraine* case provided the following:

> Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; *a measure must be "discriminatory and expose[s] the claimant to sectional or racial prejudice";* or a measure must *"target[ed] Claimant's investments specifically as foreign investments".*[220]

The ECT tribunal in the *Plama* case held that discrimination 'corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.'[221] Thus, to violate the prohibition on discrimination two issues have to be addressed: first of all, that different treatment is accorded to a specific investor and that, secondly, there is no justification for such differentiation.[222]

To establish differential treatment, it is important to determine the basis of comparison.[223] According to Kriebaum, three distinctions have been made in arbitral practice.[224] First of all, there are cases where the situation of the investor

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219. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 321. Partial Award, *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, 2007. Para. 338. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 803.
220. Decision on Jurisdiction and Liability, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 2010. Para. 261. (Footnotes omitted).
221. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184.
222. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 803-806. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 351-352.
223. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 803-804. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 196-197.
224. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 803-804.

is compared to the situation of companies active in the same economic activity.[225] However, in cases where there is not enough available information to compare the situation of the investor with the situation of others active in the same economic activity, the issue becomes more complicated.

Secondly, there are various examples of tribunals that refuse to make cross-sector comparisons.[226] For example, in various cases concerning Argentina, tribunals refused to accept that all 'public service providers' were in similar circumstances.[227] In the *BG v. Argentina* case, for instance, the tribunal refused to accept that the treatment accorded to gas DSO's was comparable to the treatment given to electricity DSO's.[228]

Thirdly, there are cases where tribunals did accept cross-sector comparisons.[229] In the *Occidental v. Ecuador* case, for example, the tribunal compared the situation of Occidental, a producer and exporter of oil, with the situation of, amongst others, exporters of flowers, bananas, seafood, and palm oil that were

225. Id. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 196-197. Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Paras. 303-326. Final Award, *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, 2004. Paras. 111-115. Decision on Jurisdiction and Liability, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 2010. Paras. 384-385. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.152. Award, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 10.3.45-10.3.53. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Paras. 788-796. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Para. 4.3.2.(a).
226. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 804.
227. Award, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2005. Para. 287-295. See also: Award on the Merits (Unofficial English Translation), *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/5, 2008. Paras. 160-164.
228. Final Award, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, 2007. Paras. 357-360.
229. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 804. Award, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, 2007. Para. 282. Award, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, 2007. Paras. 318-319. Award, *National Grid plc v. The Argentine Republic*, UNCITRAL, 2008. Paras. 197-201.

eligible for the reimbursement of value added taxes while Occidental did not receive such reimbursements.[230]

With regards to the possible justifications for differential treatment, Kriebaum noted that '[a]stonishingly little discussion has so far emerged on the possibilities to justify differences in treatment.'[231] It seems that a justification has to be rational and objectively verifiable and that in cases of cross-sector comparisons a reasonable and 'justified differentiation will be more likely than in a narrow field' of comparisons.[232]

5.4.2. ECT Arbitral Practice

Various ECT tribunals have addressed the non-impairment standard, thereby addressing both unreasonable and discriminatory measures. However, before examining how these elements have been interpreted and applied, I will first address the impairment requirement.

5.4.2.1. Impairment Requirement

Since only unreasonable or discriminatory measures that impair an investment are prohibited, it is important to establish when a measure actually impairs an investment.

In *Electrabel v. Hungary,* the tribunal held that the impairment caused by a measure must be 'significant', without elaborating on when this threshold would be met.[233] In the *PV Investors v. Czech Republic* cases, the tribunal held that the impairment needs to be 'substantial.'[234] Again, without any further statement

230. Final Award, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, 2004. Paras. 167-179.
231. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 804. Federico Ortino, 'Non-Discriminatory Treatment in Investment Disputes' in Pierre-Marie *et al* (eds.), *Human Rights in International Investment Arbitration* (Oxford University Press 2009). Pp. 351-353.
232. Ursula Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 805. Award, *National Grid plc v. The Argentine Republic*, UNCITRAL, 2008. Para. 200.
233. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.152.
234. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 636. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 596. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 601. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 683.

on when this standard was met. According to the *AES v. Hungary* tribunal, a measure impairs an investment when it reduces income while the operational costs have remained unchanged since this alters the regular income of the investor in a negative way.[235] In *Greentech v. Italy,* the majority of the tribunal considered that the impairment did not have to be 'significant' since the provision states that no contracting party 'shall *in any way* impair' an investment, which is suggestive of a low impairment requirement.[236]

In the *Nykomb* case, the tribunal did not address the impairment requirement, although it would establish a breach of the non-impairment obligation due to discriminatory treatment. In this case, the investor received a lower electricity tariff by virtue of the discriminatory treatment and thereby implicitly accepting reduced revenue as a sufficient impairment.

5.4.2.2. Unreasonable Measures

With regards to unreasonable measures it seems that most ECT tribunals have adopted the 'due process approach'. The clearest examples of these are *AES v. Hungary, Mamidoil v. Albania,* and the *PV Investors v. Czech Republic*; these tribunals all required the existence of a rational policy and that the measure was reasonable in the light of the objective pursued.[237]

In the *Plama v. Bulgaria* case*,* which was quoted in *Mohammad Ammar Al-Bahloul v. Tajikistan*, the tribunal held that '[u]nreasonable or arbitrary measures' – thereby using the terms interchangeably – 'are those which are not founded in reason or fact but on caprice, prejudice or personal preference.'[238] The *Plama* tribunal nevertheless quotes the *Saluka v. Czech Republic* tribunal, which

235. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 10.3.3-10.3.6.
236. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 461.
237. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 10.3.7-10.3.44. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Paras. 791-796. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 637. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 597. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 602. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 684.
238. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 248.

adopted the 'due process approach' by stating that reasonableness 'requires […] a showing that the State's conduct bears a reasonable relationship to some rational policy[…].'[239]

In the *Greentech v. Italy* case, an Italian measure which reduced support for RES investors was considered 'unreasonable' although the tribunal did not elaborate on the applicable standard of review.[240]

5.4.2.3. Discriminatory Measures

Several ECT tribunals have analyzed discrimination claims in the context of the non-impairment standard. From these analyses, the following picture emerges.

Firstly, ECT tribunals have most often adopted a narrow base of comparison; by looking at the treatment accorded to other investors active in the same economic activity.[241] Secondly, under the non-impairment standard discrimination claims are not restricted merely to nationality.[242] Whether discriminatory intent is required is somewhat disputed, according to the *Amto v. Ukraine* tribunal it has to be established by the investor while the *Electrabel v. Hungary* came to the opposite conclusion.[243] On the basis of arbitral jurisprudence as well as academic literature, it seems that the conclusion of the *Electrabel* tribunal is more in line with the currently prevailing legal opinion.[244]

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239. Partial Award, *Saluka Investments B.V. v. the Czech Republic,* PCA, 17/3/2006. Para. 460.
240. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 462.
241. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Para. 4.3.2.(a). Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.152. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 10.3.45-10.3.53. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Paras. 788-796.
242. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 248. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.152.
243. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 108. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.152.
244. Final Award, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, 2004. Para. 177. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 321. Partial Award, *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, 2007. Para. 338. Ursula

With regards to establishing whether reasonable or justifiable grounds exist for according diverging treatment, the *Mamidoil* case is of particular interest.[245] While the tribunal does not explicitly spell out the test that it applies to the facts, it seems to be in line with the test as laid down by the *Plama* tribunal.[246] For example, it first establishes that Albania makes a distinction between international and domestic traders in oil products.[247] Subsequently, it examines Albania's justification for this diverging treatment. In doing so, it applies a test very similar to the 'due process approach' applied by the *AES* tribunal in relation to 'unreasonable' measures: the tribunal identifies a rational policy and that the measure was reasonable in relation to the policy pursued.[248] In reaching its findings, the tribunal allowed Albania to temporarily adopt discriminatory measures in order to protect its domestic industry.[249] Since the tribunal believed that the period of discrimination is 'neither extravagant nor unreasonable', there is no violation of Albania's international obligations since the 'situation does not exceed the limits of acceptability.'[250] The tribunal thus provides the Albanian authorities with a relatively wide margin of appreciation, by virtue of which Albania did not violate its ECT obligations.

In the *Nykomb v. Latvia* case, a discrimination claim would be accepted. In this case a subsidiary of a Swedish investor had concluded a PPA with a Latvian SOE on the basis of which it was supposed to construct a co-generation plant and sell the electricity to the SOE and the heat to a municipal company. In order to incentivize domestic investments in the electricity generation sector, Latvian law provided for a double tariff to be paid for electricity generated in Latvia for the first eight years of operation, an incentive relied upon by Nykomb.[251] After the conclusion of the PPA, however, this tariff was reduced to 75 percent of the initial tariff. According to Nykomb, it was accorded discriminatory treatment

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Kriebaum, 'Arbitrary/Unreasonable or Discriminatory Measures' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 803. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 197.

245. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 184. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 248. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Paras. 788-796.
246. Ibid. Para. 795.
247. Id.
248. Id.
249. Ibid. Paras. 795-796.
250. Id.
251. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Para. 3.5.2.

since the SOE was still paying the double tariff to several domestic electricity generators.[252] Latvia did not contest this, but rather claimed that the situations were not comparable. The tribunal accepted that 'in evaluating whether there is discrimination in the sense of the [ECT] one should only "compare like with like".'[253] According to the tribunal, the evidence presented to it suggested that the companies were in fact 'comparable, and subject to the same laws and regulations.'[254] In the absence of evidence to the contrary, the tribunal considered that the respondent did not meet the burden of proof that refuted the discrimination claim.[255] Therefore, the tribunal concluded that Nykomb had been accorded discriminatory treatment in violation of Art. 10(1) ECT.[256]

5.4.3. Relevance for Renewable Energy Investors

That the non-impairment standard is of relevance to RES investors is proven by existing ECT case law.

The *Nykomb v. Latvia* case involved the refusal of a State to pay agreed support to a foreign investor. To attract foreign investors, Latvian law had entitled electricity generators that made use of RES or co-generation installations to a double tariff.[257] In addition, Nykomb's Latvian subsidiary had concluded a PPA with a SOE, that was then the monopolist electricity supplier, which explicitly referred to the double tariff.

The tribunal concluded that the investor 'had both a statutory and a contractually established right to the double tariff for an eight year period' and also held that the SOE did continue to pay the double tariff to domestic investors in violation of the non-impairment standard.[258] Since the tribunal ruled that the Latvian State was responsible for the failure of the SOE to pay the double tariff, the investor could successfully invoke the ECT provisions against Latvia and obtain compensation.[259]

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252. Ibid. Para. 4.3.2.(a).
253. Id.
254. Id.
255. Id.
256. Id.
257. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Anatole Boute, *Russian Electricity and Energy Investment Law* (Brill Nijhoff 2015). Pp. 622-624.
258. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Paras. 4.2. & 4.3.2.(a).
259. Ibid. Para. 4.2.

Various authors have pointed to the *Nykomb* case as an example of how the ECT can foster RES investments.

Sussman, for example, pointed out that the *Nykomb* case shows that the ECT creates 'rights for investors against a host government for changing incentives and subsidies committed to a foreign investor or other laws or regulations in violation of the ECT investor protection provisions.'[260] She also emphasizes that the investment certainty afforded by the ECT should 'serve to significantly increase the availability of funds for investment in [greenhouse gas] mitigation projects' since reduced risk should lead to reduced investment costs which should allow for 'a greater number of investments to be made.'[261]

In a similar vein, Boute argued that *Nykomb* 'is of considerable importance for low-carbon investors.'[262] Since the case exemplifies 'the potential protection that investment arbitration might offer against illegitimate interference by the state with the financial and regulatory basis of investments.'[263] Nevertheless, as Boute rightfully emphasizes; in this case Latvia violated the ECT because it afforded differential treatment to foreign and domestic investors.[264] Thus, the *Nykomb* case is of little precedential value in cases where support is reduced for foreign and domestic investors alike, *i.e.* those cases where the host State does not discriminate.[265]

Wälde and Hober also emphasized that in *Nykomb* the investor had to rely on investment incentives to make its investment economically viable because it would otherwise not be able to compete on the Latvian electricity market that was still (partially) dominated by inexpensive electricity supplied by former Soviet nuclear power plants in Russia that did not internalize the external costs associated with such generation.[266] They therefore argue that this case shows the potential environmental benefits of investment protection under the ECT.[267]

260. Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' [2008] 14 ILSA Journal of International & Comparative Law 391. P. 402.
261. Id.
262. Anatole Boute, 'Combating Climate Change Through Investment Arbitration' [2012] 35 Fordham International Law Journal 613. P. 643.
263. Id.
264. Anatole Boute, *Russian Electricity and Energy Investment Law* (Brill Nijhoff 2015). P. 624.
265. Id.
266. Thomas W. Wälde & Kaj Hober, 'The First Energy Charter Treaty Arbitral Award' [2005] 22 Journal of International Arbitration 83. Pp. 102-103.
267. Id.

In the *Greentech v. Italy* case, unreasonable measures violated the non-impairment standard in a RES case.[268] In Italy, the authorities attempted to control the costs of a support mechanism at the time when the targets were reached in order to 'reduce the electricity costs burden on consumers attributable to the incentive programs.'[269] Therefore, legislation was introduced that modified the previously granted tariffs.[270] In essence, the investor had to choose between three options and a failure to indicate a choice would mean that the third option would apply by default:[271] i) a new and reduced tariff would apply over twenty-four years (as calculated from the PV plant's entry into operation), instead of the original twenty-year term, whereby the level of reduction was based on the number of years that remained in the original period of twenty year; ii) the original period of twenty years would be the same, however the tariff would be reduced between 2015 and 2019 and subsequently increased in accordance with percentages determined by the Ministry of Economic Development; or iii) the twenty-year period would remain in place but the tariff would be reduced in accordance with a fixed percentage based on the nominal capacity of the PV plant: a 6 percent reduction for plants with a nominal capacity between 200 Kw and 500 Kw; 7 percent reduction for plants with a nominal capacity between 500 Kw and 900 Kw; and a 8 percent reduction for plants with a nominal capacity over 900 Kw.[272]

The majority of the tribunal concluded that 'the interests of investors must be considered in determining whether a measure is reasonable.'[273] Therefore, it was concluded that the tariff reduction 'was an "unreasonable measure" that impaired the claimant's investments' in violation of the non-impairment standard.[274]

In the *PV Investors v. Czech Republic* cases, the tribunal would reject the submission of the claimants under the non-impairment standard. In these cases, a Solar Levy introduced by the Czech Republic amounted to a *de facto* reduction of FIT's. However, the tribunal considered that this measure was 'motivated by the State's desire to safeguard the State budget in the midst of a global economic

268. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 462.
269. Ibid. Para. 143.
270. Ibid. Para. 144.
271. Ibid. Para. 145.
272. Id.
273. Ibid. Para. 462.
274. Id.

crisis' by lowering a financial burden to electricity consumers that was perceived as excessive.[275] The tribunal held 'that a "balancing" policy whereby electricity prices are lowered for the benefit of the general public and there is an equivalent diminution in excessive profits of PV investors, such that an excessive burden put on consumers might be alleviated, qualifies as a rational policy.'[276] Since the affected investments were still making a reasonable return after the introduction of the Solar Levy, even though the excessive profits had been reduced, the tribunal considered that the measures were reasonable as well.[277]

5.5. NO TREATMENT LESS FAVORABLE THAN REQUIRED BY INTERNATIONAL LAW

The penultimate sentence of Art. 10(1) ECT states that '[i]n no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.' The main question is whether this provision merely clarifies the content of other provisions, such as the FET standard and the MCSP obligation or whether it provides for additional investment protection.

On the basis of the first proposition, the penultimate sentence of Art. 10(1) ECT merely clarifies that the treatment accorded to investors on the basis of the ECT should be the most favorable one available to it, regardless of the source of this obligation.[278] If this is accepted, the fourth sentence will only 'set a floor but not

275. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 638. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 598. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 603. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 685.
276. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 639. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 599. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 604. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 686.
277. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 640. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 600. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 605. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 687.
278. Christoph H. Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards', in Graham Coop *et al* (eds.), *Investment Protection and the Energy Charter Treaty* (JurisNet 2008). P. 76.

a ceiling' on the basis of which host States should accord FET and MCPS.[279] This sentence then clarifies that the treatment accorded to investors on the basis of the FET standard must go beyond the international minimum standard of treatment.[280]

According to the second proposition, the fourth sentence does not merely clarify previously listed obligations, but rather incorporates specific obligations by reference.[281] Roe and Happold, for example, argue that the obligations of States arising under the WTO Agreements could be incorporated under Part III of the ECT by virtue of the fourth sentence.[282] An Understanding related to Arts. 26 and 27 ECT clarifies that:

> "The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970."[283]

On the basis of this understanding, EU Regulations and Directives cannot be incorporated into Part III of the ECT but the WTO Agreements, for instance, possibly could.[284] According to Roe and Happold, this incorporation-by-reference is plausible given the fact that the reference to 'treaty obligations' would 'be largely otiose if they referred only to obligations whose breach was already actionable' by the investor.[285] Nevertheless, the investor must establish a link between his investment and the provision invoked.[286]

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279. Anatole Boute, *Russian Electricity and Energy Investment Law* (Brill Nijhoff 2015). P. 628.
280. Christoph H. Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards', in Graham Coop *et al* (eds.), *Investment Protection and the Energy Charter Treaty* (JurisNet 2008). P. 88.
281. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 118-119.
282. Id.
283. Understanding Concerning Articles 26 & 27 ECT, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
284. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 118-119.
285. Ibid. P. 119.
286. Id. Award on Jurisdiction and Liability, *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana,* UNCITRAL, 1989. 95 I.L.R. 184 at 203. In this case – based on an investment contract – the investor argued that the host State violated certain human rights obligations. However, the tribunal was of the opinion that the claimant did not succesfully establish a link between his investment and the treatment accorded to it, *i.e.* the alleged human rights violation.

5.5.1. Legal Comparison of IIA's

Many BIT's concluded by the US in the 1990's contain clauses that state that investments shall not be 'accorded treatment less than that required by international law', usually in the same sentence as the FET standard and the MCPS obligation.[287] This was fully in line with US policy at the time, as becomes clear from the 1994 and 1998 US Model BIT's.[288] These clauses were interpreted by various tribunals as setting a floor but not a ceiling to the FET and MCPS obligations.[289]

From the 2004 US Model BIT onwards, however, a shift has taken place in US practice.[290] New US BIT's, such as the US-Uruguay BIT, no longer require treatment 'no less favourable than that required by international law', but rather 'in accordance with customary international law.'[291] On the basis of the arbitral practice under the pre-2000 BIT's, these new treaties no longer prescribe a 'floor' but rather a 'ceiling', the ceiling being the international minimum standard of treatment under customary international law.[292]

287. Article II(2)(a), Treaty Between the United States of America and the Republic of Bulgaria Concerning the Encouragement and Reciprocal Protection of Investment (United States-Bulgaria) (adopted 23/09/1992, entered into force 02/06/1994). Article 2(3)(a), Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investments (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001). Article II(2)(a), Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (United States-Argentina) (adopted 14/11/1991, entered into force 20/10/1994). Article II(3)(a), Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (United States-Ecuador) (adopted, 27/08/1993, entered into force 11/05/1997). Article II(3)(a), Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (United States-Ukraine) (adopted, 04/03/1994, entered into force 16/11/1996).
288. Article II(3)(a), US Model BIT, 1994. Article II(3)(a), US Model BIT, 1998.
289. Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Para. 361. Similar statements can be found in: Award, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, 2008. Paras. 336-337. Decision on Jurisdiction and Liability, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 2010. Para. 253.
290. Article 5, US Model BIT, 2004. Article 5, US Model BIT, 2012.
291. Article 5(1), Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Article 5(1), Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012).
292. This is explicitly stated in the following paragraph. See: Article 5(2), Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the

An analysis of US treaty practice and arbitral practice under US BIT's thus confirms the proposition that the penultimate sentence of Art. 10(1) ECT is merely a clarification; most likely of the FET standard and the MCPS obligation.

5.5.2. ECT Arbitral Practice

Just a few investors have explicitly invoked the fourth sentence of Art. 10(1) ECT in ISDS cases against host States. Hence, only a very limited number of ECT tribunals has addressed the standard.

In the *Nykomb v. Latvia* case, for example, the investor held that an SOE's refusal to pay the double tariff 'constitutes a treatment less favorable than required by international law, including treaty obligations.'[293] Since the tribunal would establish that the non-impairment standard had been violated, it considered it unnecessary to adjudge any other claims based on Art. 10(1) ECT.[294] Consequently, the tribunal did not grasp the opportunity to elaborate on the content of the fourth sentence.

Electrabel also invoked the fourth sentence of Art. 10(1) ECT in its case against Hungary. According to the tribunal, 'the content of this standard is, at the present time, similar to the other standards expressly mentioned in Article 10(1) ECT, which also exist as standards of protection in customary international law.'[295] Since Electrabel had not been able to establish a breach of the FET standard, the tribunal considered that the measures of Hungary did not 'constitute treatment which is less favourable than the minimum standard required by international law.'[296] Subsequently, Electrabel's claims were rejected.

The *Electrabel* tribunals' brief analysis indicates that the fourth sentence does indeed provide a clarification on other obligations of Art. 10(1) ECT, primarily that Art. 10(1) ECT is intended to provide for a higher level of investment protection than the international minimum standard. In that regard, it follows the proposition

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Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Article 5(2), Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012).

293. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Para. 1.2.3.
294. Ibid. Para. 4.3.2.(b).
295. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.158.
296. Ibid. Para. 7.159.

that the fourth sentence primarily has a clarifying character rather than being a standard which provides for additional protection.

In the *Mohammad Ammar Al-Bahloul v. Tajikistan* case, the investor also invoked the fourth sentence. However, the tribunal considered its claim under this header to be 'essentially the same as those made under the heading' of a denial of due process under the FET standard.[297] Since the tribunal had already dismissed these claims, it also dismissed the claim made under the penultimate sentence of Art. 10(1) ECT.[298]

ECT arbitral practice with regards to the fourth sentence, although it is scarce, thus supports the view that the fourth sentence clarifies the content of other standards of treatment contained in Art. 10(1) ECT such as the FET standard, and the MCPS obligation.

5.5.3. Relevance for Renewable Energy Investors

Since it is established that the most logical interpretation of the fourth sentence of Art. 10(1) ECT would not add anything to the other standards of treatment contained in Art. 10(1) ECT, but rather clarify the content of these standards, it is superfluous to address the relevance of the fourth sentence for RES investors. After all, a finding that, for example, the FET standard would have been violated in a RES case would automatically mean that the fourth sentence would also be violated.

5.6. UMBRELLA CLAUSE

The final sentence of Art. 10(1) ECT prescribes that each contracting party 'shall observe any obligations it has entered into with' an investor of another contracting party. This clause is often referred to as the 'umbrella clause' because, by virtue of this clause, an investor can bring contractual obligations and other commitments undertaken by the host State under the protective umbrella of the treaty.[299]

This is highly relevant for energy investors since the termination of contracts or concessions has been one of the most common ways in which host States

297. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Paras. 254-255.
298. Id.
299. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 166.

interfered with foreign investments.[300] Well known classical examples from the energy sector include arbitrations initiated by foreign investors against the USSR, Iran, Libya, Kuwait, and Saudi Arabia.[301] The historic roots of the umbrella clause have, for example, been traced back to the *Anglo Iran Oil Company* dispute of the 1950's which involved Iran.[302]

Although the umbrella clause of the ECT might sound straightforward, the contemporary interpretation and application of such clauses has, however, 'given rise to disturbingly divergent lines of jurisprudence' according to Dolzer and Schreuer.[303]

Practice concerning the umbrella clause will now be examined followed by an analysis of ECT arbitral practice. Finally, the relevance of the umbrella clause for RES investors will be explained.

5.6.1. Legal Comparison of IIA's

From the outset, it has to be noted that not all IIA's contain an umbrella clause. Crawford estimates that approximately 40 percent of all IIA's contain an umbrella clause.[304] Nevertheless, many different variations of the umbrella clause are in existence, which needs to be taken into account when considering the jurisprudence.

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300. Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010). Pp. 258-259.
301. See for an overview: Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). Pp. 106-130. Award, *Lena Goldfields, Ltd. v. The Soviet Union,* 3/9/1930. Text of the award retrieved from: Arthur Nussbaum, 'The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government' [1950] 36 Cornell Law Quarterly 31. Pp. 42-53. Award, *Saudi Arabia v. Arabian American Oil Company*, 1958, 27 I.L.R. 117. Award, *Sapphire International Petroleums Ltd. v. National Iranian Oil Company,* 1963, 35 I.L.R. 136. Award, *BP Exploration (Libya) Ltd. v. The Government of the Libyan Arab Republic,* 1973, 53 I.L.R. 297. Award, *Texaco Overseas Petroleum Co/California Asiatic Oil Co v. The Government of the Libyan Arab Republic,* 1977, 53 I.L.R. 389. Award, *Libyan American Oil Co. v. The Government of the Libyan Arab Republic,* 1977, 62 I.L.R. 140. Award, *The Government of the State of Kuwait v. American Independent Oil Co,* 1982, 21 International Legal Materials 976 (1982).
302. Anthony C. Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' [2004] 20 Arbitration International 411. *Anglo-Iran Oil Co. Case (jurisdiction),* Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 93. P. 112.
303. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 169.
304. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 367. Jonathan B. Potts, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization' [2011] 51 Virginia Journal of International Law 1005. P. 1007.

Although the very first BIT of 1959 already contained an umbrella clause, it would only be in the year 2000 that investors started to invoke the clause.[305]

This section will first describe the divergent approaches adopted by tribunals by reference to the specific umbrella clause contained in the applicable IIA. Furthermore, the notion of privity of contract will also be discussed as well the possibilities of extending the umbrella clause to unilateral, statutory or regulatory obligations of States.

5.6.1.1. Umbrella Clauses in IIA's and Arbitral Practice

According to Crawford, whose analysis has been reiterated in arbitration practice, the jurisprudence concerning umbrella clauses can be divided into 'four schools of thought' although the reasoning of a tribunal may contain elements of multiple schools.[306]

Firstly, there are tribunals that adopt an extremely narrow interpretation of the clause, according to which they can only be operative in the literal sense of the phrase when 'it is possible to discern a shared intent of the parties that any breach of contract is a breach of the' IIA.[307] In both arbitral practice as well as academic literature, this approach has been criticized for being too narrow although one has to keep in mind that the exact wording of a specific umbrella clause may warrant a narrow interpretation.[308]

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305. Article 7, Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (Germany-Pakistan) (adopted 25/11/1959, entered into force 28/04/1962).
306. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. Pp. 367-368. The tribunal in the *Toto v. Lebanon* case reiterated the analysis of Crawford on an almost word-by-word basis, see: Decision on Jurisdiction, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, 2009. Paras. 196-201.
307. Id. See for example: Award on Jurisdiction, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, 2004. Paras. 80-81. Decision of the Tribunal on Objections to Jurisdiction, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, 2003. Paras. 166-172.
308. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 171-173. Decision on Jurisdiction, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, 2010. Paras. 167-170. Article 11, Agreement Between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (Switzerland-Pakistan) (adopted 11/07/1995, entered into force 06/05/1996). James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 367. Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the Light of the Decision on Objections to Jurisdiction of ICSID in *SGS*

Secondly, some tribunals distinguish between the actions of a State in its capacity as sovereign and as merchant, only extending the protection of the umbrella clause to investment disputes concerning the former.[309] While one may question whether this would be correct in all situations, given the fact that 'a breach of international law does not depend on the characterization of the conduct in question as 'governmental', or as involving the exercise of sovereign authority.'[310] Therefore, this approach has received criticism in arbitral practice.[311] Again, the exact phrasing of the applicable clause may be determinative. The Netherlands Model BIT 2019 for example contains an umbrella clause where the exercise of governmental authority may be determinative for a breach of international law:

> 'When a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment.'[312]

Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, dated 1 October 2003.

309. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 368. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 172-173. Decision on Jurisdiction, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 2006. Paras. 66-88. Decision on Preliminary Objections, *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, 2006. Para. 108. Award on Jurisdiction, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, 2004. Para. 72. Award, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2005. Para. 299. Award, *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, 2007. Paras. 310-311. Decision on Jurisdiction, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 2005. Paras. 260-261. In the *Impregilo* case, the investor tried to incorporate an umbrella clause contained in BIT's signed by Pakistan by virtue of the MFN clause contained in the Pakistan-Italy BIT.
310. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 356.
311. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 206. Decision on Jurisdiction, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, 2010. Para. 168. Award, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, 2012. Paras. 89-91.
312. Article 9(5), Netherlands Model BIT, 2019.

Thirdly, there are cases where the umbrella clause can be seen to 'internationalize' the dispute, 'thereby transforming the contractual claims into treaty claims direct subject to treaty rules.'[313] This approach has equally not gone un-criticized.[314]

313. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 368. Partial Award, *Eureko B.V. v. Republic of Poland*, ad-Hoc Arbitration, 2005. Paras. 244-260. Dissenting Opinion of Arbitrator Rajski, *Eureko B.V. v. Republic of Poland*, ad-Hoc Arbitration, 2005. Paras. 10-11. Award, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, 1998. Para. 29. Award, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, 2005. Paras. 46-62. Award, *In the Matter of Revere Copper and Brass, Incorporated v. Overseas Private Investment Corporation*, American Arbitration Association, Case No. 16 10 0137 76, 1978, 17 International Legal Materials 1321 (1978). Pp. 1337-1340. Award, *Lena Goldfields, Ltd. v. The Soviet Union,* 3/9/1930. Para. 25. Text of the award retrieved from: Arthur Nussbaum, 'The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government' [1950] 36 Cornell Law Quarterly 31. P. 36. André von Walter, 'Investor-State Contracts in the Context of International Investment Law' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Peter D. Cameron, *International Energy Investment Law – the Pursuit of Stability* (Oxford University Press 2010). Pp. 108-109. V.V. Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' [1998] 47 The International and Comparative Law Quarterly 747. P. 751. Wayne Mapp, *The Iran-United States Claims Tribunal – The First Ten Years 1981-1991* (Manchester University Press 1993). Pp. 210-216. George H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996). Pp. 397-411. For cases involving 'unjust enrichment' see: Award, *Benjamin R. Isaiah v. Bank Mellat*, Award No. 35-219-2, 1983, 2 Iran-United States Claims Tribunal Reports 1984. Pp. 237-238. Award, *Dallal v. Islamic Republic of Iran,* Award No. 53-149-1, 1983, 3 Iran-United Stats Claims Tribunal Report 1984. P. 32. Award, *Sea-Land Service, Inc. v. Islamic Republic of Iran and Ports and Shipping Organization of Iran,* Award No. 135-33-1, 1984, 6 Iran-United States Claims Tribunal Reports 1986. Pp. 168-169.

314. Award, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, 2010. Paras. 349-350. *Case Concerning the Payment of Various Serbian Loans Issues in France (France v. Kingdom of the Serbs, Croats and Slovene),* PCIJ Judgment, 1929, *PCIJ Reports,* Series A (1929). P. 41. Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2007. Para. 95. Decision on Jurisdiction, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, 2009. Paras. 196-201. Award, *MTD Equity v. Republic of Chile,* ICSID Case No. ARB/01/7, 2004. Para. 187. Decision on Annulment, *MTD Equity v. Republic of Chile,* ICSID Case No. ARB/01/7, 2007. Paras. 73 & 75. Decision of the Tribunal on Objections to Jurisdiction, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 2003. Para. 126. Decision on Annulment, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, 2002. Paras. 96 & 102. Arbitral Award, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. (126/2003), 2005. P. 23. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2015). P. 303. Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013). P. 391. Similar views are shared by the following authors: Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011). P. 189. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press

The final category of cases as identified by Crawford are those where an umbrella clause may provide aggrieved investors with an operative cause of action under international law with regards to a breach of a contract, but the applicable law to the contractual dispute remains the law that applies to the contract.[315] This can imply that investors have to comply with the dispute settlement mechanism contained in the contract.[316] The conclusion that contractual dispute settlement mechanisms have to be complied with has nevertheless been criticized.[317] However, Crawford considered that *pacta sunt servanda* is 'not a one-way street', which means that '[a]n investor invoking contractual jurisdiction pursuant to an

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2011). P. 125. Jonathan B. Potts, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization' [2011] 51 Virginia Journal of International Law 1005. P. 1007. Anthony Sinclair, 'Umbrella Clause' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 915. Sinclair is nevertheless of the opinion that 'Tribunals must […] be prepared to act as check against a host State's attempts to frustrate claims simply by denying the existence of an obligation to which the umbrella clause may attach, particularly by manipulating its law-making process to that end.'

315. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 368. Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2007. Para. 95. Decision on Liability, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2012. Paras. 214-215. Final Award, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, 2013. Paras. 417-419. Award, *CEF Energia B.V. v. Italian Republic*, SCC Case No. 158/2015, 2019. Para. 255.

316. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 368. Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2007. Para. 95. Decision of the Tribunal on Objections to Jurisdiction, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 2003. Para. 126-128 & 155. Decision of the Tribunal on Objections to Jurisdiction, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, 2009. Para. 159. Decision on Jurisdiction, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, 2009. Para. 201. Award, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, 2012. Paras. 251-254. Decision on Annulment, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, 2002. Para. 98.

317. Dissenting Opinion of Antonio Crivellaro, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 2003. Para. 4. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 170. Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' [2004] 4 The Law and Practice of International Courts and Tribunals 1. Pp. 11-12. Decision on Jurisdiction, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, 2010. Para. 172.

offer made by the state must itself comply with its contractual arrangements for dispute settlement with that state.'[318]

As becomes clear, the interpretation and application of umbrella clauses has not been uniform although one always has to keep textual differences between the various clauses in mind.

5.6.1.2. Privity of Contract and the Umbrella Clause

On the basis of the umbrella clause, a contracting party has the obligation to observe any obligations it has assumed *vis-à-vis* investors. However, does the umbrella clause apply in situations where foreign investors have signed contracts with sub-entities of the host State, SOE's, or perhaps the entity responsible for the implementation of a RES policy?[319] Also, there are situations where the investment contract was not signed by the foreign parent company of the investor but rather with a local subsidiary. This section will examine the relevance of these scenarios in the application of the umbrella clause.

Firstly, the situation where the investor has entered into a contract with an entity that is not the host State in its own name. Once again, arbitral practice shows divergent lines of jurisprudence. For example, in *Impregilo v. Pakistan*, the investor had concluded a contract with the Pakistan Water and Power Development Authority which possessed separate legal personality under Pakistani domestic law. The tribunal refused to accept that the umbrella clause could provide protection for the investor in cases where the contract was concluded with a 'separate and distinct entity.'[320] In a similar vein, the *Azurix v. Argentina* tribunal refused to apply the umbrella clause in a case where the contract was concluded by the investor with the Province of Buenos Aires, instead of the Republic of Argentina.[321] This narrow approach has been applied in a number of cases.[322]

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318. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 363.
319. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 175-177.
320. Decision on Jurisdiction, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 2005. Paras. 223.
321. Award, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, 2006. Paras. 51-52.
322. Award, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, 2010. Paras. 342-346. Final Award, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, 2003. Paras. 162-163. Award, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, 2009. Paras. 316-319. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Paras. 109-112. Rudolf Dolzer &

There is also a line of jurisprudence which adopts a broader approach. For example, in the *Noble Ventures v. Romania,* the contract was concluded between the investor and a State Ownership Fund which had separate legal personality.[323] In this case, the tribunal saw no reason not to apply the umbrella clause because the Fund exercised governmental power.[324] Similarly, in the *Bosh International v. Ukraine* case, the tribunal concluded that the investor can rely on the umbrella clause if it can establish that the acts of its contracting party, which does not necessarily has to be the State itself, can be attributed to the State on the basis of the Draft Articles of State Responsibility of the International Law Commission (ILC).[325]

According to Roe and Happold, the approach of the *Noble Ventures v. Romania* tribunal is the correct one for the purpose of the ECT since 'the reference to '[e]ach Contracting Party' in Article 10(1) should be taken to mean that the conduct covered by the provision is conduct attributable to the relevant Contracting Party as a matter of international law.'[326]

In the second situation, the contract might have been concluded directly with the host State but by a subsidiary of the foreign investor and not the foreign investor itself.[327] The *Burlington v. Ecuador* case serves as a good example in this regard. The tribunal did not allow Burlington to rely on the umbrella clause of the Ecuador-US BIT to enforce the rights of its subsidiary against Ecuador.[328]

As put forward by Dolzer and Schreuer, the second issue is not problematic to investors in ECT cases since the text of the ECT's umbrella clause is sufficiently clear.[329] The final sentence makes clear that the umbrella clause applies with

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Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 175.

323. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 175. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 126-127.
324. Award, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, 2005. Paras. 82-86.
325. Award, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, 2012. Para. 246.
326. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 127.
327. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 176.
328. Decision on Liability, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2012. Para. 220.
329. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 176.

regard to 'obligations […] entered into with an Investor *or an Investment of an Investor.*'[330] This was explicitly confirmed in the *Amto v. Ukraine* case:

> "The so-called 'umbrella clause' of the ECT is of a wide character in that it imposes a duty on the Contracting Parties to 'observe any obligations it has entered into with an Investor or an Investment of an Investor of the other Contracting Party'. This means that the ECT imposes a duty not only in respect of the investor which is otherwise customary in an investment treaty context, but also a subsidiary company, established in the host state."[331]

Therefore, the ECT's umbrella clause allows foreign parent companies to enforce contracts signed by their local subsidiaries with the host State.

5.6.1.3. Statutory, Unilateral, and Regulatory Obligations

The discussion of the umbrella clause has so far focused primarily on contractual obligations between States and investors. However, the protection offered by the clause may well extend beyond that, possible including commitments undertaken by the State as expressed in its national legal framework.[332]

In the *SGS v. Pakistan* case, the tribunal had to interpret an umbrella clause which stated that: 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.'[333] Regarding this provision, the tribunal held that the 'commitments' under this clause are 'not limited to contractual commitments.'[334] Instead, the obligation to observe commitments could include

330. Id. Emphasis added.
331. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 110.
332. Maria Cristina Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder *et al* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009). P. 491. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 177-178.
333. Article 11, Agreement Between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (Switzerland-Pakistan) (adopted 11/07/1995, entered into force 06/05/1996).
334. Decision of the Tribunal on Objections to Jurisdiction, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, 2003. Para. 166.

commitments deriving from 'municipal legislative or administrative or other unilateral measure of a Contracting Party.'[335]

The *SGS v. Philippines* tribunal adopted a more restrictive interpretation. Although the tribunal did acknowledge that the umbrella clause may extend beyond contractual obligations, it did not allow a construction of the clause which would bring general legislation within its reach.[336] The umbrella clause in this case, however, required the observance of obligations to the extent that they were 'assumed with regard to specific investments.'[337] Thus, in this case the narrower interpretation might have been required by the specific phrasing of the umbrella clause in the Switzerland-Philippines BIT.

In various cases based on US BIT's, which often contain the requirement that obligations must have been 'entered into' with regard to investments, tribunals have also adopted potentially broad interpretations of the umbrella clause that may extend the scope of the provision beyond contractual commitments.[338] Nevertheless, there are also tribunals interpreting similar umbrella clauses that stress that the reference to 'entered into' 'indicates that specific commitments are referred to and not general commitments.'[339] The ICSID Annulment Committee in the *CMS v. Argentina* case, for example, emphasized that:

> "In speaking of "any obligations it may have entered into with regard to investments", it seems clear that Article II(2)I is concerned with

335. Id.
336. Decision of the Tribunal on Objections to Jurisdiction, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 2003. Para. 121. Maria Cristina Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder *et al* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009). P. 493.
337. Article X(2), Agreement Between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (Philippines-Switzerland) (adopted 31/03/1997, entered into force 23/04/1999).
338. Decision on Liability, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, 2006. Para. 175. Final Award, *Link-Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, 2002. Paras. 73-86. Award, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, 2007. Paras. 274-277. Award, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2005. Para. 303. Decision on Jurisdiction, *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, 2008. Para. 157.
339. Award, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, 2005. Para. 51.

> consensual obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law). Further they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State."[340]

Elaborating on what would constitute a consensual obligation, the Committee stated that these 'are not entered into *erga omnes* but with regard to particular persons.'[341] Nevertheless, as the *Continental Casualty v. Argentina* tribunal considered, this does not necessarily restrict the scope of the umbrella clause to contractual obligations.[342]

With regard to the umbrella clause of the ECT, this jurisprudence on the basis of US BIT's is relevant since the ECT's umbrella clause closely resembles the umbrella clauses of US BIT's in the sense that it requires the observance of any obligations 'entered into' with an investor. Thus, the reach of the umbrella clause may to some extent depend on the wording.'[343]

5.6.2. ECT Arbitral Practice

The umbrella clause has been discussed by various ECT tribunals. Nevertheless, it has to be noted that Art. 26(3)(c) ECT provides for an 'opt-out' possibility in relation to umbrella clause claims. This means that States that are listed in Annex IA of the ECT do not give their unconditional consent to arbitration for disputes arising under the umbrella clause. Four countries have made use of this option of which only one would eventually ratify the ECT: Hungary. Therefore, ECT tribunals adjudicating investment disputes involving Hungary concerning the umbrella clause lack jurisdiction over these claims, as is explicitly stated in the *AES v. Hungary* and *Electrabel v. Hungary* cases, both of which concerned the premature termination of a PPA by Hungary.[344]

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340. Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2007. Para. 95(a).
341. Ibid. Para. 95(b).
342. Award, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, 2008. Paras. 297, 300-302.
343. Maria Cristina Gritón Salias, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder *et al* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009). P. 495.
344. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.57. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22,

As noted by various ECT tribunals, the umbrella clause is phrased broadly since it refers to 'any obligation' which may be broader than just contractual obligations.[345] It is not controversial that this includes contractual obligations, including those signed by local subsidiaries.[346] Nevertheless, by reference to the Decision of the ICSID Annulment Committee in the *CMS v. Argentina* case, various ECT tribunals have also noted that the requirement that obligations must have been 'entered into' subsequently narrows the scope of the provision to consensual obligations.[347] This point was also put forward by the *Liman Caspian Oil v. Kazakhstan* tribunal, which considered that the umbrella clause 'rather seems to suggest that a contractual or similar bilateral relationship must exist between the host State and the investor.'[348] Nevertheless, in an analogical comparison between the possibility in international arbitration, where it is accepted that a State's unilateral offer for arbitration in a foreign investment law can be relied upon by investors to establish jurisdiction for an arbitral tribunal, the *Liman Caspian Oil* tribunal argued about the umbrella clause and statutory obligations that:

2010. Paras. 9.3.1-9.3.4.

345. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 186. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 257. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Paras. 332-336, 373-375. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Para. 464. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 284.

346. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Paras. 186-187. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 257. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 110.

347. Decision of the *ad hoc* Committee on the Application for Annulment of the Argentina Republic, *CMS Gas Transmission Company v. The Republic of Argentina,* ICSID Case No. ARB/01/8, 2007. Para. 95. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 186. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 257. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 767-772. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 715. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 284.

348. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 448.

> "[…] it could be argued that an abstract unilateral promise by the state in its national legislation and particularly in its laws directed to foreign investors is encompassed by the "umbrella clause"."[349]

Since the investor did not establish that Kazakhstan had violated commitments arising under the Kazakh Investment Law, the tribunal dismissed the umbrella clause claim.[350]

The *Khan v. Mongolia* case is notable because the investor successfully established a breach of the umbrella clause with regards to statutory obligations of the host State. In this case, the investor tried to invoke a provision contained in Mongolia's Foreign Investment Law.[351] The tribunal held on the basis of Art. 26 ECT that it only had jurisdiction over alleged breaches of Part III of the ECT, a formulation that – normally – would mean that it had no jurisdiction over disputes arising out of the Mongolian Foreign Investment Law.[352] This issue could, however, be overcome by virtue of the umbrella clause. The investor had argued that the terms 'any obligations' include obligations arising out of the Foreign Investment Law, an argument that was not contested by Mongolia.[353] The tribunal therefore concluded:

> "Given the ordinary meaning of the term "any" and the fact that the Respondents have not submitted any arguments or authorities to the contrary, the Tribunal accepts the Claimants' interpretation of Article 10(1) of the ECT. It follows that a breach by Mongolia of any obligations it may have under the Foreign Investment Law would constitute a breach of the provisions of Part III of the Treaty. Consequently, the Tribunal finds that it has jurisdiction under the ECT over Khan Netherlands' Foreign Investment Law claims."[354]

This conclusion would be reiterated in the tribunals' Award on the Merits where the tribunal would also establish that Mongolia had breached its obligations *vis-*

349. Id.
350. Ibid. Para. 449.
351. Decision on Jurisdiction, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, 2012. Para. 436.
352. Ibid. Para. 437.
353. Ibid. Para. 438.
354. Id.

à-vis the investor on the basis of its Foreign Investment Law.[355] In this case, the investor thus successfully enforced a statutory obligation of the State through the umbrella clause. It has to be noted, however, that the *Khan* tribunal neglected to discuss how these obligations under the Foreign Investment Law were 'entered into' by the State *vis-à-vis* the investor.

5.6.3. Relevance for Renewable Energy Investors

The umbrella clause is potentially an important provision for RES investors. Firstly, in several jurisdictions support to RES producers is or was awarded on the basis of FIT contracts while in the hydroelectric sector operators are often awarded concessions or licenses.[356] Therefore, there may well be situations where investors can establish a contractual relationship with a State, or a SOE or private company in charge of implementing a RES policy. Secondly, in some jurisdictions RES producers may be eligible for financial support on the basis of statutory or regulatory law.[357] In Spain, for example, RES producers had to be

355. Award on the Merits, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, 2015. Paras. 295, 296 & 366.

356. Ontario, Canada: Independent Electricity System Operator (former Ontario Power Authority), Feed-in Tariff Contract (FIT Contract), Version 5.0, 2016. UK: Low Carbon Contracts Company, Contract for Difference (CfD), 2015. Italy: Gestore Servizi Energetici, Convenzione con il GSE. Greece: Electricity Market Operator/Hellenic Electricity Distribution Network Operator, Feed-in Tariff Operating Aid Contract (FiTC). See also: Jan-Christoph Kuntze & Tom Moerenhout, 'Are Feed-in Tariff Schemes with Local Content Requirements Consistent with WTO Law?' in Freya Baetens *et al* (eds.), *Frontiers of International Economic Law – Legal Tools to Confront Interdisciplinary Challenges* (Brill Nijhoff 2014). P. 154. Watson Farley & Williams, 'Greek Renewables Support Scheme: Draft Legislation July 2016' (*Watson Farley & Williams*, 2016) <http://www.wfw.com/wp-content/uploads/2016/07/WFW-GreekRenewablesSupportScheme.pdf> accessed on 18/11/2016. Danai Fati & Panagiota Makri, 'Greece: Major Changes to the Greek Support Scheme for Renewable Energy Production – The 'New Deal' Legislation and Its Implementation to Date' [2015] 88 Renewable Energy Law & Policy Review 88. Saverio Francesco Massari, 'The Italian Photovoltaic Sector in Two Practical Cases: How to Create an Unfavorable Investment Climate in Renewables' [2015] 12 Transnational Dispute Management 1. Watson Farley & Williams, 'Italy: New Decree with Incentives for Renewable Energy Plants (other than PV Plants) and Rules on Contiguity and Modifications Applicable also to PV Plants' (*Watson Farley & Williams,* 2016) < http://www.wfw.com/wp-content/uploads/2016/07/WFW-Italy-NewFERDecree.pdf > accessed on 18/11/2016. Denmark: the Danish Energy Agency, Contract for a Price Premium for Electricity Generated at Solar Photovoltaic Installation(s), 2016. <https://www.ethics.dk/asp5/tender/ens_0501_20160831.nsf/stddocsPub?OpenView&count=-1&ExpandView> accessed on 07/02/2017.

357. Spain: Royal Decree 661/2007, Legislation Development of the Spanish Electric Power Act, Volume 11, 2009..

registered before they could be eligible to receive support.[358] Arguably, investors can invoke the umbrella clause in cases where the State does not honor its statutory commitments *vis-à-vis* the investor.

In cases involving contractual disputes, a few issues are important to point out which will be done by reference to the contracts awarded to 'low carbon electricity generators' in the UK on the basis of the Contracts for Difference (CfD) program. The CfD and the standard conditions attached to these contracts contain a detailed legal framework for the generation of 'low carbon' electricity, including the remuneration scheme.[359] On the basis of the standard terms, the law governing the CfD is English law.[360] In addition, the terms and conditions also contain a dispute resolution mechanism which provides for alternative dispute resolution as well as arbitration at the London Court of International Arbitration (LCIA).[361] On the basis of a considerable number of investment arbitration cases this means that foreign investors in the UK that conclude a CfD should resort to the dispute settlement mechanism as contained in the contract in the case of a dispute concerning the CfD.[362] In case a contractual dispute would nevertheless be submitted to an ECT tribunal, for example because the ECT tribunal accepts jurisdiction over the CfD despite the arbitration clause, the ECT tribunal would have to interpret and apply the CfD in accordance with English law, which on the basis of the standard terms is the applicable law.[363]

358. Ibid. Articles 9, 14 & 17.
359. See: Contracts for Difference. <https://www.gov.uk/government/collections/electricity-market-reform-contracts-for-difference> accessed on 18/11/2016.
360. Article 86.1, FiT Contract for Difference Standard Terms and Conditions, 2015. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492815/CfD_-_Standard_Conditions_-_26_October_2015.pdf> accessed on 18/11/2016.
361. Ibid. Part 14.
362. Decision of the Tribunal on Objections to Jurisdiction, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, 2009. Para. 159. Decision on Jurisdiction, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, 2009. Para. 202. Award, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, 2012. Para. 251. Decision of the Tribunal on Objections to Jurisdiction, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, 2003. Paras. 142-143
363. Decision of the Tribunal on Objections to Jurisdiction, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, 2009. Para. 159. Decision on Jurisdiction, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, 2009. Para. 201. Award, *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, 2012. Paras. 251-254. Decision on Annulment, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, 2002. Para. 98.

A final notable characteristic of the CfD program is the fact that the RES generator will enter into the contract with a SOE called the Low Carbon Contracts Company, which is fully owned by the British Department of Business, Energy & Industrial Strategy. The contractual partner for the RES investor will, therefore, not be the UK government but a SOE.

This should not, however, be problematic since the tribunal should determine whether the acts of the SOE that is party to a contract are attributable to the host State on the basis of Art. 5 of the ILC Draft Articles on State Responsibility. This provision states:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[364]

According to the commentary of the ILC Draft Articles the purpose of Art. 5 is:

> "[…] to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions."[365]

The ECT tribunal *Amto v. Ukraine* supports this line of reasoning.[366] An interesting precedent in this regard is the NAFTA case *Mesa v. Canada,* where the tribunal held that acts of the corporate entities responsible for the implementation of the FIT program of Ontario were attributable to Canada.[367] It has to be noted, however, that this conclusion was reached on the basis of a *lex specialis* rule on attribution contained in NAFTA and did not specifically involve a claim under

364. Article 5, Draft Articles on Responsibility of States for Internationally Wrongful Acts (with commentaries), November 2001, International Law Commission, Supplement No. 10 (A/56/10), chp.IV.E.1. <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > accessed on 21/11/2016.
365. Ibid. Article 5 paragraph 1.
366. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 102.
367. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Paras. 348-377.

the umbrella clause. In the NAFTA case *Windstream v. Canada,* the tribunal came to a similar conclusion by stating that under the Electricity Act of 1998, the Government of Ontario had the power to 'issue directions' to the Ontario Power Authority, the entity that was responsible for the implementation of the FIT Program.[368] As a consequence the tribunal believed that 'to the extent that [Ontario Power Authority] acted on the basis of such directions, its conduct could be considered attributable to Canada, depending on whether the direction in question involved a delegation of governmental authority to the' Ontario Power Authority.[369] Thus, in cases where an SOE or private company is by law in charge of the implementation of RES policy, attribution is of profound importance. Nevertheless, regulatory changes to RES policy as implemented by these SOE's or private parties may still be attributable to the State to the extent that they exercised governmental authority.

Another example would be Italy, where investors in the PV sector would receive a letter confirming their entitlement to a FIT from the SOE in charge of the RES support scheme, after having qualified for the incentives. Subsequently, the PV investors would also enter into a contract with that SOE, which sets forth the specific FIT that it would receive and the relevant dates. The tribunal in *Greentech v. Italy* interpreted the umbrella clause broadly and, while considering the facts of the case as a whole – including relevant legislative decrees as well as the letters from the SOE and the contracts signed therewith – the tribunal held that the obligations assumed by Italy were 'sufficiently specific' in order to fall within the scope of the umbrella clause.[370]

In *CEF Energia v. Italy,* the tribunal nevertheless held that the relevant contracts were subject to a unilateral modification option under Italian law.[371] Due to this delineation under Italian law, a breach of the umbrella clause of the ECT could not be established.[372]

368. Award, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, 2016. Para. 234.
369. Id.
370. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Paras. 464-467.
371. Award, *CEF Energia B.V. v. Italian Republic*, SCC Case No. 158/2015, 2019. Paras. 248-255.
372. Ibid. Paras. 254-255.

As the *Khan v. Mongolia* case showed, investors can also invoke the umbrella clause to rely on 'obligations' arising from national law. Interesting RES cases where investors relied on national law to make their investment involve Spain. In these cases, many investors relied on RD 661/2007. This decree laid down FIT's and the requirement that in order to receive the support provided under this scheme, investors had to be registered in the 'Administrative Register of Production Facilities under the Special Regime' (RAIPRE).[373]

Arguably, the FIT's laid down in such a scheme would constitute an obligation within the scope of the umbrella clause. By reference to ECT cases like *Plama v. Bulgaria, Mohammad Ammar Al-Bahloul v. Tajikistan*, and *Khan v. Mongolia,* investors can point to authorities that held that statutory obligations fall within the scope of the umbrella clause.[374]

A literal reading of the ECT's umbrella clause requires that the investors also establish that the obligations under statutory law were 'entered into' by the host State with an investor or an investment of an investor. Although the *Khan v. Mongolia* tribunal did not address this requirement, there is more ECT arbitral practice to the contrary, with several ECT tribunals referring to the Decision on Annulment in the *CMS v. Argentina* case.[375]

In cases concerning the Spanish FIT program investors can argue that the registration requirement and, more particularly, the moment that they are admitted into the RAIPRE would constitute the moment that the obligations arising under RD 661/2007 are 'entered into' with an investor or an investment of an investor.[376]

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373. See for an overview of the regulatory system in Spain: Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 110-128.
374. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 186. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 257. Decision on Jurisdiction, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, 2012. Para. 438.
375. Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 2007. Para. 95. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 186. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 257. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 448.
376. See for an overview of the regulatory system in Spain: Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016.

In essence, it is from this moment that RD 661/2007 entitles RES investors to very specific support and, hence, it is from this moment that obligations arise under Spanish national law *vis-à-vis* the RES investor.[377] A failure to observe these obligations could be considered to be a violation of the ECT. Whether the umbrella clause would be breached in cases of amendments to the support schemes remains to be seen. As argued by Crawford:

> "The enactment of a law by a state, whether it is specific or general, is not the entry by the state into an obligation distinct from the law itself. No doubt a state is obliged by its own laws, but only for so long as they are in force. In the absence of express stabilization, investors take the risk that the obligations of the host state under its own law may change, and the umbrella clause makes no difference to this basic proposition."[378]

The *Isolux v. Spain* case was the first occasion where this line of reasoning was tested in practice. The tribunal nevertheless rejected these arguments by stating that only specific commitments between States and investors are protected under the umbrella clause, while general regulatory acts that apply to both domestic and foreign investors are not.[379] Similar lines of reasoning were adopted by the *Novenergia v. Spain* and *RREEF v. Spain* tribunals.[380] The *Foresight v. Spain* tribunal adopted a similar approach and held that the umbrella clause only applies with regards to specific commitments instead of general legislative

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Paras. 110-128.

377. The importance of the RAIPRE registration and the fact that the benefits contained in RD 661/2007 were dependend on such registration were acknowledged by arbitrator Tawil in his dissenting opinion. Note, however, that the umbrella clause was not invoked in the *Charanne* case, and the discussion of Tawil was in relation to a FET claim. See: Dissenting Opinion of Prof. Dr. Guido Santiago Tawil, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 9-10.
378. James Crawford, 'Treaty and Contract in Investment Arbitration' [2008] 24 Arbitration International 351. P. 370.
379. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 767-772. Interestingly, the tribunal did acknowledge that certain exceptions may exist and referred to the *Liman Caspian Oil v. Kazakhstan* case to point out that legislation specifically addressed to foreign investors may be invoked through the umbrella clause.
380. Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 715. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Paras. 285-287.

acts.[381] The tribunal considered that neither RD 661/2007 nor the registration in RAIPRE amounted to an obligation entered into by Spain.[382] In *9REN Holding v. Spain*, the tribunal also rejected this argument, stating that the umbrella clause 'is apt for a bilateral contract, such as a concession or licence agreement' but not for 'a State's public legislation or administrative regulations' since a 'State does not "enter into" such legislation with a private party.'[383]

Thus, a distinction apparently has to be made in applying the umbrella clause in relation to statutory obligations: it can be directly invoked if it concerns a Foreign Investment Law which directly addresses foreign investors, but it cannot be invoked to enforce renewable energy law that applies to foreign and domestic investors alike.

5.7. NATIONAL- AND MOST FAVORED NATION TREATMENT

On the basis of Art. 10(7) ECT, investors are to be accorded treatment no less favorable than that the host State accords to its own investors or investors from other contracting parties or any third State, whichever is the most favorable.[384] These obligations are known as the NT and MFN obligations. These obligations prevent discrimination between a foreign investor *vis-à-vis* domestic investors or *vis-à-vis* other foreign investors. In the absence of these rules, host States might sometimes be inclined to treat domestic investors more favorable as this might be considered to be in the national interest of the State.[385] With these rules, an investor, once established in the host State, should be allowed to compete on a level playing field. According to economic theory, this should 'foster competition and economic growth.'[386]

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381. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 413.
382. Id.
383. Award, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, 2019. Para. 342.
384. Article 10(7) states: "Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable."
385. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 245.
386. Id.

Under the ECT, the content of the NT and MFN obligations may overlap with the prohibition on discriminatory measures under the non-impairment standard. However, there are at least two differences. Firstly, under the NT and MFN obligations there is no requirement that a discriminatory measure 'impairs' an investment, a mere difference in treatment suffices. Secondly, the NT and MFN prohibits discrimination based on nationality, while the prohibition on discriminatory treatment under the non-impairment standard may include other forms of discrimination as well.

5.7.1. Legal Comparison of IIA's

The most significant deviation in IIA's regarding the NT and MFN obligations is related to the scope of the provision, *i.e.* whether it applies in the pre-establishment phase of an investment or merely post-establishment.[387] In case of the ECT, NT and MFN treatment is only accorded in the post-establishment phase of an investment, contrary to for example NAFTA where NT and MFN treatment also applies with regards to the establishment, acquisition, and expansion of an investment.[388] As will be discussed more in depth in chapter 6.1, this has significant implications for the scope of the NT and MFN obligations.

Other differences are less significant. Sometimes NT and MFN obligations are incorporated separately, while in other IIA's they are contained in the same provision.[389] In the case of the ECT, both obligations are incorporated in the same provision and the investor is entitled to receive the treatment 'whichever is more favourable.' Sometimes, NT and MFN are linked to other standards of treatment. The Russian Model BIT of 2002, for example, links the NT and MFN obligations to the FET standard.[390]

The test that is usually applied when the NT and MFN provisions are invoked largely resembles the test that is applied under the prohibition of discriminatory

387. Compare, for example, Article 1102 NAFTA with Article 10(7) ECT. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 246-247.
388. Articles 1102 & 1103, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994).
389. August Reinisch, 'Most Favoured Nation Treatment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 815. August Reinisch, 'National Treatment', in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 850. In the NAFTA, for example, the NT and MFN obligations are contained in separate provisions: Articles 1102 & 1103.
390. Article 3(1) & (2), Russian Model BIT, 2002.

measures under the non-impairment standard.[391] This means that the base of comparison has to be established first, followed by an examination of whether differential treatment has been accorded to the investor in the absence of a justification.[392] Like the prohibition on discriminatory measures under the non-impairment standard, the most widely held view is that discriminatory intent does not have to be proven to establish a breach of the NT or MFN obligations although arbitral practice is not completely consistent in this regard.[393]

In relation to the base of comparison, it is interesting to note that during the ECT negotiations it was discussed whether or not an explicit requirement that investors are 'in like circumstances' should be incorporated in Art. 10(7) ECT. Canada and the US, who had included this requirement in NAFTA Arts. 1102 and 1103, argued in favor of such inclusion.[394] According to the US it was important to clarify that foreign investors cannot make claims to the same treatment as accorded to 'any domestic investor, but rather to the treatment offered to a domestic investor who is in a similar situation.'[395] The US supported this argument with the, perhaps somewhat exaggerated, example that an investor in the energy sector cannot claim that it should be subjected to the same safety regulations

391. See chapter 5.4.
392. August Reinisch, 'National Treatment', in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 856-864. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 199-204. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 248-251. Andrea K. Bjorklund, 'National Treatment' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 38-54.
393. August Reinisch, 'National Treatment', in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 864-866. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 203-204. For arbitral tribunals that did not require discriminatory intent, see: Award, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, 2002. Para. 181. Decision on Responsibility, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, 2008. Para. 138. Award, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, 2007. Para. 368. For Arbitral Tribunals that held the contrary, see: Award, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, 2001. Para. 369. Final Award of the Tribunal on Jurisdiction and Merits, *Methanex Corporation v. United States of America*, UNCITRAL, 2005. Part IV Chapter B Para. 12.
394. Article 13, Specific Comment 13.1, CONF 64, Draft ECT – Fourth version, 7 July 1993. <http://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/18_-_ECT_4__07.07.93_.pdf> accessed on 20/12/2016.
395. Article 10, Binder 3/4, Plenary Session 28 June-2 July 1993, Room Document 23.

as a domestic investor engaged in book publishing.[396] The US and Canadian proposal would, however, never make it to the final ECT text.[397]

It has to be noted that in many IIA's the NT and/or MFN obligations may be subject to exceptions. The most common exceptions are related to taxation or Regional Economic Integration Organizations (REIO).[398] In the ECT, Art. 24(4) contains an REIO exception for the MFN obligation and Art. 21(3) one regarding taxation. The consequences thereof will be discussed in chapter 7.

In relation to the MFN obligation, it is worth noting that there is a significant body of arbitral case law where investors have tried to 'import' more favorable substantive or procedural provisions from other IIA's to their dispute.

In *Bayindir v. Pakistan* and *CME v. Czech Republic* for example, the investors relied on the MFN provision in the basis treaty to import a FET standard or a more favorable expropriation provision, respectively.[399] According to Reinisch, '[i]t is widely accepted that MFN clauses may be relied upon by investors in order to claim a better substantive treatment accorded by a host State to investors of a third State.'[400] Perhaps the strongest authority in favor of this point can be found in the SCC *Berschader v. Russia* case, where the tribunal held:

> "[…] it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties […]"[401]

396. Id.
397. Article 10, Binder 3/4, Points discussed in Sub-Group on 1 and 2 July 1993 on Article 13. Pp. 4-5.
398. August Reinisch, 'Most Favoured Nation Treatment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 818-819.
399. Ibid. Pp. 819-823. Decision on Jurisdiction, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 2005. Paras. 231-232. Award, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 2009. Paras. 155-160. Final Award, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, 2003. Paras. 497-500.
400. August Reinisch, 'Most Favoured Nation Treatment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 820. For similar statements, see: Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 211. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 354.
401. Award, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, 2006. Para. 179.

Whether investors can invoke the MFN provision to incorporate more favorable ISDS provisions from other IIA's is less clear.[402] Investment tribunals have come to diverging conclusions with regards to this question, although it has to be noted that the language of a specific MFN obligation may be determinative in a specific case.[403] One of the tribunals that rejected an attempt by an investor to import a more favorable ISDS provision through the MFN obligation is the *Plama v. Bulgaria* case.[404] In essence, the claimant tried to circumvent Art. 17 ECT regarding denial of benefits under the ECT, in case this provision would affect the jurisdiction of the tribunal on the basis of the ECT, and base the jurisdiction of the ICSID Tribunal on the Cyprus-Bulgaria BIT as an alternative source of

402. Id. August Reinisch, 'Most Favoured Nation Treatment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 824-840. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 270-275. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 128-130.

403. August Reinisch, 'Most Favoured Nation Treatment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 824-840. For tribunals allowing investors to rely on the MFN provision to import a more favorable ISDS provision, see: Decision of the Tribunal on Objections to Jurisdiction, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, 2000. Para. 56. Decision on Jurisdiction, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2004. Paras. 102-103. Decision on Jurisdiction, *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, 2011. Para. 72. Decision of the Tribunal on Preliminary Questions on Jurisdiction, *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, 2005. Para. 31. Decision of the Tribunal on Objections to Jurisdiction, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, 2006. Paras. 102-105. Award on Jurisdiction, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, 2007. Paras. 132-139. Decision on Jurisdiction, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, 2012. Paras. 182-186. For tribunals that have rejected such an interpretation of MFN clauses, see: Decision on Jurisdiction, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, 2004. Para. 119. Award, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, 2006. Para. 100. Award, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, 2006. Paras. 194 & 208. Award on Preliminary Objections, *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No. 24/2007, 2009. Para. 119. Award, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, 2008. Para. 171. Final Award, *Austrian Airlines v. The Slovak Republic*, UNCITRAL, 2009. Para. 135. Award on Jurisdiction, *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, 2012. Paras. 451-456.

404. Decision on Jurisdiction, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2005. Para. 183.

jurisdiction for the tribunal.[405] The *Plama* tribunal, however, rejected this in an unequivocal manner:

> "[…] an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[406]

Regarding the MFN provision of the ECT, Roe and Happold have argued that it cannot be used to import an ISDS provision that is more favorable to the investor than Art. 26 ECT. According to them, one of the most important rules of treaty interpretation is that 'interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.'[407] Allowing an investor to invoke an ISDS provision that is more favorable to it than Art. 26 ECT, because Art. 26 contains certain limitations, would reduce parts of the ECT to redundancy or inutility while there is nothing in the text of the ECT's MFN provision that would allow for such a construction.[408]

5.7.2. ECT Arbitral Practice

Although various investors have relied on Art. 10(7) ECT, there is surprisingly little jurisprudence on this provision that could provide doctrinal guidance on the interpretation of this provision. In some cases, claims regarding Art. 10(7) ECT are quickly dismissed because there is overlap with claims under other standards of treatment that had already been dismissed by the tribunal.[409] While in other cases claims regarding discrimination are merely brought under the non-impairment standard or the tribunal considers the overlap to be so significant that it simply refers claims based on Art. 10(7) ECT to the analysis of the tribunal under the non-impairment standard.[410] In yet other cases, the claimant has failed

405. Id.
406. Ibid. Para. 223.
407. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 129. Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 1996. P. 23.
408. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 129-130.
409. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Paras. 271-277.
410. In *Nykomb v. Latvia,* the investor did not even invoke Art. 10(7) ECT but merely brought a discrimination claim under the non-impairment standard: Arbitral Award, *Nykomb*

to substantiate the claim on Art. 10(7) which leads the tribunal to dismiss the claim.[411]

Even in literature, ECT case law on discriminatory treatment under the non-impairment standard is sometimes equated with NT, although both obligations are contained in separate provisions.[412]

5.7.3. Relevance for Renewable Energy Investors

The lack of ECT case law on Art. 10(7) ECT does not mean, however, that it is not a relevant provision. Current ECT case law involving discrimination already demonstrates its value for RES investors. As was already discussed in Chapter 5.4.3 on the non-impairment standard, the *Nykomb v. Latvia* case demonstrates that support for energy production is sometimes reduced in a discriminatory manner, by altering the level of support paid to foreign investors while sparing domestic producers.

Another interesting dispute involving the NT and MFN obligations is the NAFTA case *Windstream Energy v. Canada.* In this RES case, the investor had obtained a FIT Contract under the Ontario FIT Program to construct an offshore wind park. However, the investor was subsequently unable to construct its wind park since a moratorium for offshore wind parks was put in place for various reasons.[413] According to the investor, both the NT and MFN obligations were breached.

Regarding the NT claim, Windstream argued that there was a Canadian investor, TransCanada, that had also successfully applied for a FIT Contract but that also ran into difficulties when trying to get the project of the ground.[414] Contrary to Windstream however, the Canadian investor was awarded a new project and was compensated for any costs associated with the cancellation of the initial project.[415]

Synergetics Technology Holding AB v. The Republic of Latvia, SCC, 2003. Para. 1.2.3. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 11.3.2 & 12.3.2.

411. Decision on Jurisdiction, Applicable Law and Liability, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Paras. 7.160-164.
412. August Reinisch, 'National Treatment', in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 861.
413. Award, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, 2016. Paras. 206-212.
414. Ibid. Paras 387-388.
415. Id.

Concerning the MFN claim, Windstream compared its situation to that of Samsung, a South Korean investor.[416] After the moratorium was put in place, Windstream had proposed to the authorities to construct a solar park instead of the offshore wind park. The authorities in Ontario did not approve of this proposal while they did allow Samsung to construct a similar project. Hence, this constituted preferential treatment that should also be accorded to Windstream, according to the claimant.

Finally, Windstream argued that all developers of large wind parks were allowed to proceed through the regulatory process and that it was the only one that was confronted with a moratorium notwithstanding the fact that it was the only one who was awarded a FIT Contract for an offshore wind park.[417]

The reasoning of the tribunal concerning these claims is highly interesting for RES investors, specifically in relation to its findings on the basis of comparison. Contrary to Art. 10(7) ECT, NAFTA contains a specific requirement under Arts. 1102 and 1103 that investors must be 'in like circumstances'. According to the tribunal, however, developers of offshore wind farms are not 'in like circumstances' as developers of onshore wind parks or solar projects:

> "Unlike TransCanada and Samsung, the Claimant had a FIT Contract for offshore wind development, and indeed it was the only holder of such a contract. Accordingly, the moratorium and the related measures did not apply to TransCanada and Samsung in the first place, which therefore were not affected by them. The Tribunal further notes that the moratorium only applied to offshore wind and that it was not applied in a non-discriminatory manner in that it resulted in the cancellation of all offshore wind projects, with the exception of that of the Claimant, which was the only holder of a FIT Contract. The Tribunal is therefore unable to agree that the Claimant was treated less favorably than other prospective developers of offshore wind projects, which were the only proponents that could be said to have been in "like circumstances.""[418]

Hence, the claims were rejected.

416. Ibid. Para. 389.
417. Ibid. Para. 390.
418. Ibid. Para. 414.

Despite the fact that, contrary to NAFTA, the ECT does not contain an explicit 'in like circumstances' requirement, ECT practice under the non-impairment standard has so far adopted an approach along comparable lines in cases involving claims of discrimination where a base of comparison had to be established. In *Nykomb v. Latvia,* the tribunal held that one has to 'compare like with like', which in that case meant that the position of the foreign investor in a co-generation facility had to be compared to the treatment accorded to domestic investors subjected to the same laws and regulations.[419] In a similar vein, in the *AES v. Hungary* and *Electrabel v. Hungary* the ECT tribunals also adopted a narrow base of comparison; by comparing the treatment accorded to the foreign investors to the treatment accorded to domestic investors active in the same activity, namely the generation of electricity.[420]

It is therefore not unthinkable that in an ECT case a tribunal would come to the same conclusion as the *Windstream* tribunal. There may be compelling reasons why one cannot compare the situation of offshore wind park developers to the situation of onshore wind park developers. The technical, environmental, jurisdictional, and financial considerations are very different between onshore and offshore wind parks. Also, the regulatory process offshore may well be very different than onshore because the interests involved are very different: onshore one has to take local residents into account while this is not the case offshore where maritime traffic, sea-lanes, and the protection of the marine enviroment may be important considerations to take into account. Therefore, much can be said in favor of the conclusion of the *Windstream* tribunal.

These cases show that the NT and MFN obligations may be relevant for RES investors: if host States differentiate between foreign and domestic investors in the post-establishment phase of an investment, this may amount to a violation of the international obligations of the State. However, when establishing the basis of comparison for a NT or MFN claim, it may not always be suitable to compare the situation of a wind developer to the situation of a solar or hydro project as there are significant differences between the various forms of RES. Of course,

419. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Para. 4.3.2.(a).
420. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 7.152. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras. 10.3.45-10.3.53.

the extent to which this holds true may depend to a large degree on the facts of each individual case.

5.7.4. Recent Treaty Practice

Recent treaty practice, specifically concerning the MFN obligation, sometimes specifically addresses the possibility of importing more favorable ISDS or substantive provisions from other IIA's. The CPTPP, for example, clarifies in its MFN provision that: "For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement)."[421] Practice of the EU goes even further than merely excluding the possibility of importing more favorable ISDS provisions by also stating that '[s]ubstantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.'[422]

These treaties thus provide more clarity in relation to some of the most contested issues in the application of the MFN-standard by specifically excluding the possibility to import a (more favorable) ISDS provision or a standard of treatment from another IIA that provides for a higher level of investment protection.

5.8. EFFECTIVE MEANS CLAUSE

The final paragraph of Art. 10 ECT contains the so-called 'effective means clause' and prescribes that '[e]ach Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investment, investment agreements, and investment authorizations.' During the ECT negotiations the US and Japan had lobbied for the inclusion of this provision.[423] Their main concern was that, while the ISDS provision of the ECT by that time provided jurisdiction for investment arbitration or domestic courts over disputes concerning the ECT, the domestic court avenue was not a 'genuine' option as long as there was no treaty obligation under the

421. Article 9.5(3), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018).
422. Article 8.7(4), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
423. Specific Comment to Article 23(2) in 3/93 Annex 1, BA 32, Basic Agreement, 18 January 1993.

ECT to provide for effective means for an investor to assert claims and enforce rights through the domestic courts.[424]

5.8.1. Legal Comparison of IIA's

The effective means clause can primarily, but not exclusively, be found in US BIT's concluded up and to the early 2000's.[425] Interestingly, from the 2004 US Model BIT onwards the clause moved from the operative part of the treaty to the preamble.[426] According to Vandevelde, this policy change is brought about by a believe on behalf of US officials that 'the customary international law principle prohibiting denial of justice provides adequate protection and that a separate treaty obligation' was no longer necessary.[427] Until recently, the standard was rarely invoked, arguably because investors considered that the provision overlaps with the FET standard's prohibition on denial of justice.[428] It has been said that the overlap between the two standards is indeed significant.[429]

In the *Duke Energy v. Ecuador* case, for example, the tribunal held that the provision 'seeks to implement and form part of the more general guarantee against denial of justice.'[430] A much broader meaning was given to the effective

424. Specific Comment 23.2, BA-35, Basic Agreement, 9 February 1993 <http://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/13_-_BA_35__09.02.93__.pdf> accessed on 05/01/2017.
425. See for example: Article II(4), US Model BIT, 1994. Article II(4), US Model BIT, 1998. Article II(6), Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (United States-Argentina) (adopted 14/11/1991, entered into force 20/10/1994). Article II(7), Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (United States-Ecuador) (adopted, 27/08/1993, entered into force 11/05/1997). Article II(7), Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investments (United States-Ukraine) (adopted, 04/03/1994, entered into force 16/11/1996). For a non-US BIT with the effective means standard, see: Article 3(3), Agreement Between the Government of The Hashemite Kingdom of Jordan and The Government of the State of Kuwait for the Encouragement and Protection of Investments (Jordan-Kuwait) (adopted 21/05/2001, entrance into force still pending).
426. Preamble, US Model BIT, 2004. Preamble, US Model BIT, 2012. Jessica Wirth, '"Effective Means" Means? The Legacy of *Chevron v. Ecuador*' [2013] 52 Columbia Journal of Transnational Law 325. P. 333.
427. Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford University Press 2009). Pp. 412-415.
428. Jessica Wirth, '"Effective Means" Means? The Legacy of *Chevron v. Ecuador*' [2013] 52 Columbia Journal of Transnational Law 325. P. 334.
429. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 130.
430. Award*, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, 2008. Para. 391.

means standard by the tribunal in *Chevron v. Ecuador*. Essentially, the tribunal held that 'an "effective means" standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice.'[431] Accepting that the effective means clause constitutes a *lex specialis* instead of a mere restatement of a prohibition on denial of justice under customary international law means that the threshold of liability to establish a breach of international law is lowered. As the tribunal itself explains:

> "[T]he Tribunal agrees with the Claimants that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law. The test for establishing a denial of justice sets, as the Respondent has argued, a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of "a particularly serious shortcoming" and egregious conduct that "shocks, or at least surprises, a sense of judicial propriety". By contrast, under Article II(7) [of the US-Ecuador BIT], a failure of domestic courts to enforce rights "effectively" will constitute a violation of Article II(7), which may not always be sufficient to find a denial of justice under customary international law."[432]

A more concrete elaboration on what the standard requires was subsequently provided for by the tribunal. A State has to provide for laws and a judicial system that is capable of rendering effective results, which means that there may be no "indefinite or undue delay."[433] The statement of the *Chevron* tribunal was so broad that it gave rise to diplomatic tensions between Ecuador and the US and even led to inter-State arbitration on the basis of the US-Ecuador BIT between the two States.[434]

Despite the controversy surrounding the *Chevron* tribunals' findings, its interpretation was subsequently followed by the *White Industries v. India*

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431. Partial Award on the Merits, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 34877, 2010. Para. 242.
432. Ibid. Para. 244.
433. Ibid. Para. 250. Jessica Wirth, '"Effective Means" Means? The Legacy of *Chevron v. Ecuador*' [2013] 52 Columbia Journal of Transnational Law 325. P. 340.
434. Award, *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05, 2012. Para. 41. Jessica Wirth, '"Effective Means" Means? The Legacy of *Chevron v. Ecuador*' [2013] 52 Columbia Journal of Transnational Law 325. P. 327.

tribunal.[435] The *White* tribunal summarized the content of the effective means clause as follows:

> (a) "the "effective means" standard is *lex specialis* and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law;
>
> (b) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case;
>
> (c) a claimant alleging a breach of the effective means standard does not need to establish that the host State interfered in judicial proceedings to establish a breach;
>
> (d) indefinite or undue delay in the host State's courts dealing with an investor's "claim" may amount to a breach of the effective means standard;
>
> (e) court congestion and backlogs are relevant factors to consider, but do not constitute a complete defence. To the extent that the host State's courts experience regular and extensive delays, this may be evidence of a systemic problem with the court system, which would also constitute a breach of the effective means standard;
>
> (f) the issue of whether or not "effective means" have been provided by the host State is to be measured against an objective, international standard;
>
> (g) a claimant alleging a breach of the standard does not need to prove that it has exhausted local remedies. A claimant must, however, adequately utilise the means available to it to assert claims and enforce rights. It will be up to the host State to prove that local remedies are available and the claimant to show that those remedies were ineffective or futile;

435. Final Award, *White Industries Australia Limited v. The Republic of India*, UNCITRAL, 2011. Paras. 11.3.2-11.3.3.

(h) whether or not a delay in dealing with an investor's claim breaches the standard will depend on the facts of the case; and

(i) as with denial of justice under customary international law, some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case and the behaviour of the courts themselves."[436]

The relatively recent pronouncements of the *Chevron* and *White* tribunals, the latter of which received the approval of the *Gavazzi v. Romania* tribunal, have potentially turned the effective means clause from a standard that lay dormant for years to one that may be appealing to investors that have experienced proceedings at ineffective foreign judiciaries.[437]

5.8.2. ECT Arbitral Practice

Various ECT tribunals have discussed the effective means clause.

In *Petrobart v. Kyrgyz Republic*, the tribunal would eventually establish a violation of the provision.[438] In this case, the investor had obtained a domestic court judgment in its favor against an SOE in the amount of USD 1.5 mln. However, before the investor was able to execute the judgment, the Vice Prime Minister of the country successfully requested a domestic court to stay the execution for three months. During these three months the SOE was restructured and its valuable assets were transferred to other SOE's. As a consequence, the company was bankrupt by the time the three months were over and Petrobart could not obtain the proceeds from its judgment.

Without providing any clarity or insight on the meaning of Art. 10(12) ECT, the tribunal held that it considered 'the Vice Prime Minister's letter to the Chairman of the Bishek Court, which gave support for a stay of execution of the [judgment] violated […] the Kyrgyz Republic's obligation under Article 10(12) of the [ECT] to

436. Id.
437. Decision on Jurisdiction, Admissibility and Liability, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, 2015.
438. For a description of the facts, see: Arbitral Award, *Petrobart Limited v. The Kyrgyz Republic,* SCC Case No. (126/2003), 2005. Para. I.

ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments."[439]

The tribunal in the *Amto v. Ukraine* case provided clarity on the effective means standard although it rejected Amto's claim based on Art. 10(12).[440] According to the tribunal:

> "The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals."[441]

According to the *Amto* tribunal, ''effective' is a systematic, comparative, progressive and practical standard':[442]

> "It is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12). It is comparative in that compliance with international standards indicates that imperfections in the law might result from the complexities of the subject matter rather than the inadequacies of the legislation. It is progressive in the sense that legislation ages and needs to be modernized and adapted from time to time, and results might not be immediate. Where a State is taking the appropriate steps to identify and address deficiencies in its legislation -in other words improvement is in progress- then the progress should be recognized in assessing effectiveness. Finally, it

439. Ibid. Pp. 28-29.
440. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 89.
441. Ibid. Para. 87.
442. Ibid. Para. 88.

> is a practical standard in that some areas of law, or the application of legislation in certain circumstances, raise particular difficulties which should not be ignored in assessing effectiveness."[443]

Although the tribunal would eventually reject Amto's claims, its analysis did provide more clarity on the content of the effective means clause.

In the RES case *Charanne v. Spain* the claimants also invoked Art. 10(12). Their argument was essentially that the Spanish government, when adopting measures that affected the economic viability of PV investments, opted for a Royal Decree Law as a legal instrument with 'the sole purpose of avoiding the political and social debate that may generate controversial legislative modifications.'[444] The claimants added to this that 'Spanish law does not allow a filing of a contentious-administrative claim against a [Royal Decree Law] and the use of this measure with the aim of "avoiding the myriad of contentious-administrative claims that the members of the photovoltaic industry would have presented to challenge the measures" constitutes a violation of the obligation under Article 10(12) of the ECT'.[445]

According to the tribunal, Art. 10(12) 'requires States to provide a legal framework that guarantees effective remedies to investors for the realization and protection of their investments.'[446] Although this does not impose 'any obligation on States regarding the way in which it organizes its judicial system', it does require an examination of the legal system of the State as a whole.[447]

The tribunal would reject the arguments of the claimants in the *Charanne* case since it was of the opinion that the Spanish means were sufficient to satisfy Art. 10(12) ECT.[448] Also, the tribunal believed that the effective means clause cannot impose 'on the State specific requirements for organizing its review system, such as forcing the State to provide a system of direct control of the constitutionality of acts with a legislative character.'[449]

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443. Ibid. Para. 88.
444. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 469.
445. Id.
446. Ibid. Para. 470.
447. Id.
448. Ibid. Para. 472.
449. Id.

Under the ECT, Art. 10(12) thus obliges States to provide a system of judicial rules and institutions through which investors can effectively enforce rights and assert claims. Effective, in this regard, means that the standard is 'systematic, comparative, progressive and practical.'[450] The standard does not, however, impose specific requirements upon the State for organizing its review system for legislative or executive acts in a certain way.

5.8.3. Relevance for Renewable Energy Investors

The added value of effective means clause in the ECT for investors is that one could argue that it provides a *lex specialis* rule regarding due process and denial of justice with a lower threshold of liability than the FET standard. Nevertheless, whether the standard will be beneficial to RES investors in cases where justice is not denied to them remains to be seen. Cases like *Petrobart v. Kyrgyz Republic, White Industries v. India,* and *Chevron v. Ecuador* all had as common denominator that the claimants complained about treatment accorded to them by domestic courts of the host State. In that sense, the argument put forward by claimant in *Charanne* was very different since it turned around the legal instrument adopted by the authorities which adversely affected claimants' investment. From the award it does not become clear that they had actually pursued local remedies, which is a requirement according to the *Chevron* tribunal.[451] From the *Isolux v. Spain* case, which concerned the same investments as those in the *Charanne* case, it does become apparent that the investors had been engaged in domestic court proceedings.[452]

It therefore seems most likely that Art. 10(12) is of interest to investors that have been accorded questionable treatment in domestic courts although, as the *Amto* tribunal acknowledged, the substantive domestic law may also give rise to Art. 10(12) claims when it is 'antiquated and totally ineffective.'[453]

However, there is no reason to believe that RES investors are particularly often confronted with a denial of justice. Rather, it seems to be a problem related

450. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 88.
451. Partial Award on the Merits, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 34877, 2010. Paras. 323-327.
452. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 789-800.
453. Final Award, *Limited Liability Company Amto v. Ukraine*, SCC Case No. (080/2005), 2008. Para. 87.

to specific countries that are struggling with providing investors with a judicial process that is capable of handling investment cases in accordance with international standards. Therefore, the relevance of the effective means clause in relation to RES investors will not be developed further.

5.9. COMPENSATION FOR LOSSES

On the basis of Art. 12(1) ECT, except in those situations where Art. 13 ECT applies, 'an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.'

As discussed under the MCPS obligation under Art. 10(1) ECT, a host State is not liable for any and all damages suffered by investors, rather host States have a due diligence obligation.[454] The same goes for damage arising due to war, civil disturbance, or a state of national emergency. It has been said that the main purpose of provisions like Art. 12 ECT is to ensure that in times of emergency, foreign investors are not 'adversely discriminated against with respect to whatever protection a host state affords to its own investors.'[455]

This section will briefly introduce Art. 12 ECT by reference to other IIA's. Since claims based on Art. 12 ECT will most likely only arise after a rather exceptional course of events, it cannot be said that RES investors have a specific interest in this provision. Therefore, Art. 12 ECT will not be elaborated upon extensively. Since, to the best of the author's knowledge, there are no ECT cases where tribunals discussed Art. 12, the section discussing ECT arbitral practice will be omitted.[456]

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454. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 336.
455. Id.
456. It does seem, however, that Article 12 was invoked in the *Plama v. Bulgaria* case: Decision on Jurisdiction, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2005. Para. 132. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Paras. 236 & 249.

5.9.1. Legal Comparison of IIA's

Like Art. 12 of the ECT, most IIA's do not provide investors with an absolute right to compensation in cases of emergency, but rather entitle them to the same treatment as the host State accords to either its own investors or investors of a third State with regards to restitution, indemnification, compensation or other settlement, *i.e.* the NT and MFN obligations apply.[457] Nevertheless, there are also BIT's where the reference to NT is omitted and only a MFN obligation applies.[458] Hence, the host State may provide more favorable treatment to its domestic investors in comparison to foreign investors.

Again in line with many IIA's, Art. 12(2) ECT provides that an investor who suffers a loss resulting from 'requisitioning of its Investment or part thereof by the [host State's] forces or authorities' or the 'destruction of its Investment or part thereof by the [host State's] forces or authorities, which was not required by the necessity

457. Ibid. Para. 337. See, for example: Article 5(3), Accord Entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur L'Encouragement et la Protection Réciproques des Investissements (France-Argentina) (adopted 03/07/1991, entered into force 03/03/1993). Article 5(1), Agreement Between the People's Republic of China and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments (China-Spain) (adopted 14/11/2005, entered into force 01/07/2008). Article 8, Agreement Between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (Australia-India) (adopted 26/02/1999, enterd into force 04/05/2000). Article 5(1), Agreement Between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments (Hong Kong-New Zealand) (adopted 06/07/1995, entered into force 05/08/1995). Article 7, Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Suriname (Netherlands-Suriname) (adopted 31/03/2005, entered into force 01/09/2006). Article 12(1), Agreement Between Japan and the Republic of Iraq for the Promotion and Protection of Investment (Japan-Iraq) (adopted 07/06/2012, entered into force 01/02/2014). Article 8.34, Free Trade Agreement between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (Eurasian Economic Union-Vietnam) (adopted 29/05/2015, entered into force 05/10/2016). Article 5, Agreement Between the Government of the Kingdom of Denmark and the Government of the Russian Federation Concerning the Promotion and Reciprocal Protection of Investments (Denmark-Russia) (adopted 04/11/1993, entered into force 26/08/1996).

458. Article 7, Agreement Between the Government of the Russian Federation and the Government of the Arab Republic of Egypt on the Encouragement and Mutual Protection of Capital Investments (Russia-Egypt) (adopted 23/09/1997, entered into force 12/06/2000). Article 4(5), Federal Republic of Germany and Union of Soviet Socialist Republics Agreement Concerning the Promotion and Reciprocal Protection of Investments (Germany-Soviet Union) (adopted 13/06/1989, entered into force 05/08/1991). Article 5, Agreement Between the Government of Canada and the Government of the Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments (Canada-Soviet Union) (adopted 20/11/1989, entered into force 27/06/1991).

of the situation' 'shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.'[459]

5.9.2. Relevance for Renewable Energy Investors

Since the provision on compensation for foreign investors for losses in cases of war, armed conflict, state of national emergency, or civil disturbance is related to potential investment risks to which all investors are exposed, there is no reason to believe that this provision may be particularly interesting for RES investors. In addition, as argued by Salacuse, provisions like Art. 12 are primarily intended 'to compensate for physical damage caused by war, revolution, or civil disturbance, not injuries resulting from a state's regulatory measures.'[460] Therefore, it is very unlikely that investors who suffer from reduced FIT's because the State had to implement austerity measures in the wake of a severe economic crisis can successfully invoke Art. 12 ECT. Hence, the provision will not be elaborated upon.

5.10. EXPROPRIATION

It has been said that the notion of private property is central to the very existence of international investment law and this is most clearly enshrined in Art. 13 ECT, which lays down the criteria that have to be met to lawfully expropriate, directly or indirectly, assets from foreign investors.[461]

5.10.1. Legal Comparison of IIA's

The ECT provides for the following in Art. 13(1):

> "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
>
> (a) for a purpose which is in the public interest;
>
> (b) not discriminatory;

459. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 337.
460. Ibid. P. 339.
461. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010). P. 47.

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation."

This is a traditional expropriation provision as advocated by capital exporting States and is currently often found in many IIA's.[462]

That does not mean, however, that the norm as laid down in Art. 13 ECT was never contested. Quite, to the contrary, during the 20th century international rules regarding expropriation were amongst 'the most bitterly debated issues of international law'.[463] Newly independent capital importing countries, Communist States and Latin American countries adopted views that diverged significantly from the positions held by capital exporting States and which were also reflected in pre-war international jurisprudence, as became clear during the debate on the New International Economic Order that culminated in several resolutions from the UN General Assembly.[464] Particularly thorny issues were the requirement of

462. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 192. Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press 2014). Pp. 232-233. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 99-101.

463. Patrick M. Norton, 'Back to the Future: Expropriation and the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 366-367, 375-377. Muthucumaraswamy Sornarajah, 'Compensation for Nationalization: The Provision in the European Energy Charter' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 386-393. Karl Marx, Friedrich Engels, Jeffrey C. Isaac & Steven Lukes, *The Communist Manifesto* (Yale University Press 2012). P. 85. Judgment, *Banco Nacional de Cuba v. Sabbatino,* US Supreme Court, 376 U.S. 398 (1964). P. 428.

464. Permanent Sovereignty over Natural Resources, UNGA Res 3171 (XXVII) (17 December 1973). This clearly went beyond what was adopted by UNGA Resolution 1803, which held: Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962). Rudolf Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' [1981] 75 American Journal of International Law 553. Pp. 558-559. Green H. Hakworth, *Digest of International Law, Vol. III* (United States Government Printing Office 1942). Pp. 658-659. For the Mexican objection to the statement of Secretary of State Hull, see: Eduardo J. de Aréchaga, 'The Duty to Compensate for the Nationalization of Foreign Property' [1963] 2 Yearbook of the International Law Commission 237. P. 238. 'The Government of Mexico stated in its reply to the United States that " the transformation of

compensation in case of an expropriation and the method of judicial review. As a consequence, many authors in the 1980's were cautious to make any statement status of protection against expropriation under customary international law.[465]

Despite the controversy over expropriation in international law, the IIA's concluded in the 1990's would mark a definite return of the expropriation provisions as

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a country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end ".' Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers 1998). P. 142. Award of the Tribunal, *Norwegian Shipowners' Claims (Norway v. United States of America),* PCA Case No. 1921-01, 1922. Note: this tribunal applied a mix of both municipal law as well as international law, see p. 25. Nevertheless, the tribunal concluded that, on the basis of both municipal US law (the Fifth Amendment) and international law, the claimants were entitled to 'just compensation.' Award, *Lena Goldfields, Ltd. v. the Soviet Union,* 3/9/1930. Text of the award retrieved from: Arthur Nussbaum, 'The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government' [1950] 36 Cornell Law Quarterly 31. Pp. 42-53. Note: In this case it was argued, and the tribunal seems to have concurred with that, that in relation to performance of the concession contract USSR Russian law was the proper law of contract but that for other purposes, general principles of law, as recognized in Art. 38(1)(c) of the PCIJ Statute, was the proper law of the contract. See also: V.V. Veeder, 'The *Lena Goldfields* Arbitration: The Historical Roots of Three Ideas' [1998] 47 International and Comparative Law Quarterly 747. Pp. 750-751. *British Claims in the Spanish Zone of Morocco*, 2 Report of International Arbitration Awards (1925). P. 615. *Case Concerning the Factory at Chorzow (Germany v. Poland)* (Claim for Indemnity) (the Merits) [1928], PCIJ Reports Series A No. 17. P. 47. Note: this case of often used to support the view that full compensation is required under international law. However, the PCIJ made this statement in a case where it had established that an illegal seizure of property had taken place in violation of a treaty obligation. Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009). P. 377.

465. Patrick M. Norton, 'Back to the Future: Expropriation and the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 365. Muthucumaraswamy Sornarajah, 'Compensation for Nationalization: The Provision in the European Energy Charter' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 386. Oscar Schachter, 'Compensation for Expropriation' [1984] 78 American Journal of International Law 121. Pp. 121-122. Lee A. O'Connor, 'The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State' [1983] 6 Loyola of Los Angeles International and Comparative Law Review 355. P. 356. Eduardo J. de Aréchaga, 'State Responsibility for the Nationalization of Foreign Owned Property' [1978] 11 New York University of International Law and Politics 179. P. 179-180. Rudolf Dolzer, 'New Foundations of the Law of Expropriation of Alien Property' [1981] 75 American Journal of International Law 553. P. 553. Burns H. Weston, 'The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth' [1981] 75 American Journal of International Law 437. Pp. 437-439. Award of the Arbitral Tribunal, *Libyan American Oil Company (LIAMCO) v. the Government of the Libyan Arab Republic,* 12/4/1977, [1981] 20 International Legal Materials 1. P. 76.

advocated by capital exporting States.[466] Article 13 ECT contains four cumulative conditions that have to be satisfied for an expropriation to be lawful, namely:

1) The expropriation must be in the public interest;

Given the broad meaning, this element is rarely contested by investors and even if, tribunals usually grant States a wide margin of discretion to determine what constitutes 'public interest' in their respective jurisdictions.[467]

2) Not discriminatory;

Expropriatory measures should not be discriminatory by according different treatment to various investors without a reasonable justification.

3) Carried out under due process of law;

This requirement 'demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.'[468]

4) And accompanied by the payment of prompt, adequate and effective compensation.

The compensation requirement contains three elements.[469] Prompt refers to a temporal aspect, an investor should not have to wait years for its compensation. Adequate refers to a quantum element, an investor has to receive the 'fair market value' of the investment as becomes evident from Art. 13 ECT. Effective refers to a functional element, meaning that an investor should be granted compensation

466. Jeswald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' [1990] 24 The International Lawyer 655. P. 670.
467. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 99-100.
468. Award, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, 2010. Para. 395. Award of the Tribunal, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, 2006. Para. 435.
469. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 192.

in a currency that is actually of use to it. This implies that compensation should be granted in a freely convertible currency that can be repatriated to the home State.

It has been said that the adoption of this standard in the ECT in the early 1990's is of special significance because of the multilateral nature of the ECT, which includes the participation of many former Communist States that had fiercely opposed the standard only years earlier.[470] This overhaul is partially related to economics: autarkic self-dependency policies in many Second and Third World countries failed utterly, forcing these countries to compete for FDI to revive their economy.[471] This enhanced the bargaining power of capital exporting States that were now able to set the terms.

Currently, provisions on expropriation in IIA's are relatively uniform and resemble the ECT's provision.[472]

Recent innovations in IIA's related to the drafting of expropriation provisions most often concern the concept of indirect expropriation rather than direct expropriation. Direct expropriations have become relatively rare and, if they occur, are easy to identify.[473] Indirect expropriations, on the other hand, are more problematic: they occur when a legal title may not be taken formally but where the consequences of a (series of) measure(s) is similar to expropriation. Nevertheless, most government regulations that affect foreign investors do not constitute indirect expropriations and are thus non-compensable. However, drawing the exact line between non-compensable government regulation and

470. Patrick M. Norton, 'Back to the Future: Expropriation and the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 366-367, 375-377. Muthucumaraswamy Sornarajah, 'Compensation for Nationalization: The Provision in the European Energy Charter' in Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Pp. 386-393.

471. Patrick M. Norton, 'Back to the Future: Expropriation and the Energy Charter Treaty' in Thomas W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). P. 375.

472. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 192. Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press 2014). Pp. 232-233. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 99-101. For examples of treaties that deviate from the standard expropriation formula, see: Article 7, Brazil Model BIT, 2015. The Brazilian Model BIT only provides protection against direct expropriation, and not against indirect expropriation.

473. Ibid. P. 230. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 151.

indirect expropriation is difficult since many IIA's do not contain guidance on this matter. This was acknowledged by a tribunal in the *Saluka v. the Czech Republic* case:

> "[…] international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable. In other words, it yet has to draw a bright and easily distinguishable line between non-compensable regulation on the one hand, and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law."[474]

Annexes to expropriation provisions in various recent IIA's try to respond to these needs by providing more guidance on where to draw this line.[475] These

474. Partial Award, *Saluka Investments B.V. v. the Czech Republic,* PCA, 17/3/2006. Para. 263.
475. Annex 8-A, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Annex 9-B, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018). Annex B.13(1), Canada Model BIT 2004 and Annex B, US Model BIT 2012 contain similar clauses and have made it into the following BITs: Annex I, Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (Canada-Hong Kong) (adopted 10/02/2016, entered into force 06/09/2016). Annex B, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (Canada-Latvia) (adopted 05/05/2009, entered into force 24/11/2011). Annex B.10, Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada-Mali) (adopted 28/11/2014, entered into force 28/11/2014). Annex B.13(1), Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (Canada-Peru) (adopted 14/11/2006, entered into force 20/06/2007). Annex B.10, Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (Canada-Senegal) (adopted 27/11/2014, entered into force 05/08/2016). Annex B.10, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (Canada-Serbia) (adopted 01/09/2014, entered into force 27/04/2015). Annex A, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada-Slovakia) (adopted 20/07/2010, entered into force 14/03/2012). Annex B, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Annex B, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012).

innovations, however, should not be considered as signs of changed perceptions on the notion of private property and the protection thereof, but should rather be considered as responses to deficiencies in existing IIA's that lead to unexpected or undesirable outcomes of investment cases.[476] Therefore, they contain more guidance on where to draw the line between non-compensable governmental regulation and indirect expropriation without altering the conditions that have to be met for an expropriation to be lawful.

The debate in international law in relation to expropriation has thus moved from the issues of compensation and the method of judicial review to the issue of whether or not a taking has actually occurred.[477] In relation to the former debate, the ECT is very unequivocal: compensation is required and affected investors can invoke the ECT's ISDS provision to settle any disputes which, at the time of conclusion in 1994, represented a major shift in policy of primarily the former Communist contracting parties of the ECT. In relation to the latter debate, the ECT is clearly lacking any textual guidance. Nevertheless, would the ECT be concluded today it is not unimaginable that the ECT's expropriation provision would be supplemented with an interpretive annex that is similar to the annexes contained in recent IIA's.

The following sections will describe the concepts of direct and indirect expropriation by reference to arbitral practice. Also, it will be analyzed how the recent treaty innovations relate to arbitral practice.

5.10.1.1. Direct Expropriation

It has been said that cases of direct expropriation have become rare in recent years, although they still occur from time to time.[478] As recognized by the NAFTA tribunal in the *Feldman v. Mexico* case, if they do occur then they are relative easy to recognize: 'governmental authorities take over a mine or factory,

476. An example of such an outcome is the *Metalclad v. Mexico* case: Award, *Metalclad v. the United Mexican States,* ICSID Case No. ARB(AF)/97/1, 30/8/2000.
477. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 152-153. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2004). P. 344.
478. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 296. Ursula Kriebaum, 'Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 971. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 151. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 234.

depriving the investor of all meaningful benefits of ownership and control.'[479] According to Kriebaum, 'the transfer of title is the decisive criterion to distinguish a direct expropriation from an indirect one.'[480] Also, a loss of control over the investment can be considered as a sign of direct expropriation.[481] One of the reasons that direct expropriations are rare these days is the perception that it may be detrimental to the investment climate of the host State.[482]

5.10.1.2. Indirect Expropriation

Nowadays, the most common form of expropriation is indirect expropriation, which usually does not involve the transfer of title or loss of control over an investment, but where the ownership rights associated with an investment erode by State interference(s).[483] As stated by Hoffmann, '[i]ndirect expropriations appear in a great multiplicity and although the general concept is not new, the unanswered questions surrounding them are manifold.'[484] Perhaps the main contested issue and most difficult question to answer in cases involving indirect expropriation is where to draw the line between legitimate government regulation on the one hand and indirect expropriation on the other hand. After all, even if it is obvious that the government is acting in the pursuit of a public interest this 'cannot automatically lead to the conclusion that no expropriation has occurred.'[485] Also, most IIA's require a 'public purpose' for an expropriation to be lawful, which implies that the existence of such purpose alone cannot lead

479. Award, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, 2002. Para. 100.
480. Ursula Kriebaum, 'Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 971. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 151.
481. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 294.
482. Ursula Kriebaum, 'Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 971. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 151. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 234.
483. UNCTAD, *Taking of Property – UNCTAD Series on Issues in International Investment Agreements* (United Nations, 2000). P. 20. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 151.
484. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 152.
485. Ursula Kriebaum, 'Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 1000.

to the conclusion that no expropriation took place, since it is a requirement of lawfulness.[486]

Because investment tribunals have adopted various approaches and nuances to these approaches when examining claims of indirect expropriation, this section will merely outline the two main doctrines that have been adopted in practice.[487] These are the so-called 'sole effects doctrine' and the 'police powers doctrine.'

i. Sole Effects Doctrine

On the basis of the sole effects doctrine, the effect of the contested measures on the investment is the most important criterion and in some cases even the only one.[488] Dolzer wrote in 2002 that '[n]o one will seriously doubt that the severity of the impact upon the legal status, and the practical impact on the owner's ability to use and enjoy his property, will be a central factor in determining whether a regulatory measure effects a taking.'[489] Therefore, Dolzer believes that the controversial issue is merely 'the question of whether the focus on the effect will be the only and exclusive relevant criterion ("sole effect doctrine"), or whether the purpose and the context of the governmental measure may also enter into the takings analysis.'[490] The sole effects doctrine has been adopted by the Iran-US Claims Tribunal (IUSCT) and various tribunals constituted under IIA's.[491]

486. Id.
487. Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' [2008] 15 Australian Journal of International Law 267. P. 267. It is sometimes suggested that more than two approaches have been applied in practice. See for example: Ursula Kriebaum, 'Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 1006-1010. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). Pp. 242-256.
488. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 156. Anders Nilsson & Oscar Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' [2013] 30 Journal of International Arbitration 561. P. 565.
489. Rudolf Dolzer, 'Indirect Expropriations: New Developments?' [2002] 11 New York University Environmental Law Journal 64. P. 79.
490. Ibid. Pp. 79-80.
491. See for example: Interlocutory Award, *Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. the Government of the Islamic Republic of Iran, Bank Omran, Bank Mellat, Bank Markazi,* Award No. ITL 32-24-1, 4 Iran-United States Claims Tribunal Reports 1985. P. 154. Award, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the Government of the Islamic Republic of Iran, Civil Aviation Organization, Plan and Budget Organization, Iranian Air Force, Ministry of Defence, Bank Melli, Bank Sakhteman, Mercantile Bank of Iran and Holland,* Award No. 141-7-2, 6 Iran-United States Claims Tribunal Reports 1986. Pp. 225-226. Award, *Técnicas*

For example, the NAFTA *Metalclad v. Mexico* tribunal held:

> "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[492]

The *Pope & Talbot v. Canada* tribunal stated that the required threshold for interference in order to constitute indirect expropriation is the 'substantial deprivation' of property.[493] The ICSID *Ad-hoc* Annulment Committee in the *Mitchell v. Congo* case held that mere reference to the effect of a measure is practice amongst the majority of arbitrators.[494] In this case the ICSID tribunal had applied the sole effect doctrine which, according to the Annulment Committee, was within the powers of the tribunal to do so.[495]

Despite the fact that tribunals have used different terminology in the application of the sole effect doctrine, the body of case law adopting the doctrine provides 'an authoritative basis' for the doctrine according to Mostafa.[496]

Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, 2003. Paras. 115-116. Award, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 2008. Para. 463.

492. Award, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, 2000. Para. 103.
493. Interim Award, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, 2000. Para. 102.
494. Decision on the Application for Annulment of the Award, *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, 2006. Para. 53.
495. Ibid. Para. 54. Extracts of the Award, *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, 2004. Paras. 70-71.
496. Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' [2008] 15 Australian Journal of International Law 267. P. 287. Ursula Kriebaum, 'Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 984-985.

ii. Police Powers Doctrine

On the basis of the police powers doctrine, a measure that is taken by the authorities in the exercise of its police powers will not give rise to the liability of that State on the basis of expropriation if certain requirements are complied with.[497] This doctrine was already adopted by the IUSCT in 1989 in the *Too v. Greater Modesto Insurance* case, where the IUSCT held that a 'State is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.'[498]

The doctrine was applied in various NAFTA cases, such as *Feldman v. Mexico, Methanex v. the United States,* and *Chemtura v. Canada*.[499] The *Chemtura* tribunal argued the following:

> "[…] the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation."[500]

The doctrine has also been adopted outside NAFTA, for example in the *Saluka v. Czech Republic* case, where the tribunal stated:

497. Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' [2008] 15 Australian Journal of International Law 267. Pp. 272-273.
498. Award, *Emanuel Too v. Greater Modesto Insurance Associates and the United States of America*, Award No. 460-880-2, 23 Iran-United States Claims Tribunal Reports 1994. Para. 26.
499. Award, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, 2002. Paras. 103-104. Final Award, *Methanex Corporation v. The United States of America,* UNCITRAL, 2005. Part IV, Chapter D, para. 7. Award, *Chemtura Corporation v. Government of Canada*, UNCITRAL, 2010. Para. 266.
500. Award, *Chemtura Corporation v. Government of Canada*, UNCITRAL, 2010. Para. 266.

> "[…] the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police power of States" forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v. USA* said recently in its final award, "[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required."[501]

The *El Paso v. Argentina* tribunal, which applied the doctrine, nevertheless recognized that unreasonable measures may constitute indirect expropriation if they result in the 'neutralisation of the foreign investors property rights.'[502] Other limitations may be related to the legitimate expectations of the investor or a lack of proportionality of the contested measures.

The argument put forward by investment tribunals that adopt the police powers doctrine can be summarized as acknowledging that under international law, States are allowed to adopt measures that are detrimental to investors as long as they are applied in a non-discriminatory manner with a public purpose and provided that the measure is enacted in accordance with due process of law.

5.10.1.3. Interpretive Annexes in Recent IIA's

The difficulty concerning indirect expropriation is thus primarily where to draw the line between non-compensable government regulation and compensable indirect expropriation. To provide more clarity to investment tribunals, several recent IIA's contain interpretive annexes that contain guidelines in this matter.[503]

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501. Partial Award, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, 2006. Para. 262. See also: Award, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 2011. Para. 240.
502. Award, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, 2011. Para. 241. See also: Decision on Liability, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, 2006. Para. 195.
503. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 166-167. Annex 8-A, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Annex B.13(1), Canada Model BIT 2004 and Annex B, US Model BIT 2012 contain similar clauses and have made it into the following BITs: Annex I, Agreement Between the Government of Canada and the Government of

These, often comparable but not identical annexes, provide for something along the following lines:

> "The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:
>
> (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
>
> (b) the duration of the measure or series of measures of a Party;
>
> (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and
>
> (d) the character of the measure or series of measures, notably their object, context and intent."[504]

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the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (Canada-Hong Kong) (adopted 10/02/2016, entered into force 06/09/2016). Annex B, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (Canada-Latvia) (adopted 05/05/2009, entered into force 24/11/2011). Annex B.10, Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada-Mali) (adopted 28/11/2014, entered into force 28/11/2014). Annex B.13(1), Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (Canada-Peru) (adopted 14/11/2006, entered into force 20/06/2007). Annex B.10, Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (Canada-Senegal) (adopted 27/11/2014, entered into force 05/08/2016). Annex B.10, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (Canada-Serbia) (adopted 01/09/2014, entered into force 27/04/2015). Annex A, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada-Slovakia) (adopted 20/07/2010, entered into force 14/03/2012). Annex B, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Annex B, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012).

504. Annex 8-A(2), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).

Also, these annexes contain the following presumption:[505]

> "For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."[506]

It has been said that interpretive annexes on the meaning of indirect expropriation can be traced back to jurisprudence of the US Supreme Court regarding 'regulatory takings' and also codify the police powers doctrine, which would greatly enhance the legitimacy of this doctrine.[507] Also, these provisions emphasize that a mere loss of value of the investment does not mean that an expropriation has occurred by stating that 'the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred.'

As said, these annexes are by no means identical. For example, both the US and Canada Model BIT's contain the paragraphs quoted above, which incorporates

505. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 167.
506. Annex 8-A(3), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
507. Award, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, 2016. Para. 300. August Reinisch, 'The Interpretation of International Investment Agreements' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 391. Jonathan Bonnitcha, *Substantive Protection under Investment Treaties* (Cambridge University Press 2014). Pp. 263-270. Matthew C. Porterfield, 'International Expropriation Rules and Federalism' [2004] 23 Stanford Environmental Law Journal 3. Pp. 42-43. Céline Lévesque & Andrew Newcombe, 'The Evolution of IIA Practice in Canada and the United States' in Armand de Mestral *et al* (eds.), *Improving International Investment Agreements* (Routledge 2013). P. 36. Judgment, *Penn Central Transportation Co. v. New York City,* US Supreme Court, 438 U.S. 104 (1978). Pp. 124-125. Judgment, *Kaiser Aetna v. United States*, US Supreme Court, 444 U.S. 164 (1979). P. 175. Award, *Marvin Feldman v. the United Mexican States,* ICSID Case No. ARB(AF)/99/1, 2002. 98. Partial Award, *S.D. Myers Inc. v. Government of Canada,* UNCITRAL, 2000. Paras. 280-283. Award, *Generation Ukraine v. Ukraine,* ICSID Case No. ARB/00/9, 2003. Paras. 20.34-20.35. Award, *Fireman's Fund Insurance Company v. the United Mexican States,* ICSID Case No. ARB(AF)/02/1, 2006. Para. 176. Final Award of the Tribunal on Jurisdiction and Merits, *Methanex Corporation v. the United States of American,* UNCITRAL, 2005. Part IV, Chapter D, para. 7. Partial Award, *Saluka Investments B.V. v. the Czech Republic,* PCA, 2006. Para. 262.

US Supreme Court jurisprudence and the police powers doctrine.[508] The IIA's concluded by the EU, and the Netherlands Model BIT 2019 and the Belgium-Luxembourg Model BIT 2019, also codify the sole effects doctrine.[509] Given the fact that these annexes were intended to bring more clarity to the concept of 'indirect expropriation', codifying alternative standards of review might not be the most clarifying approach.

As evidenced by the *Philip Morris v. Uruguay* case, these annexes can influence the outcome of investment cases based on older treaties that do not yet contain this new practice. The tribunal interpreted the expropriation provision of the applicable BIT by reference to new treaty practice, in this case the clarification on expropriation of CETA.[510] The *Philip Morris* tribunal was of the opinion that the annex reflected 'the position under general international law.'[511]

5.10.2. ECT Arbitral Practice

Although the threshold to establish an (in)direct expropriation is rather high and successful claims are therefore rare, Art. 13 is nevertheless often invoked in ECT arbitration. The body of jurisprudence is therefore voluminous. To make it comprehensible, this section will first provide an overview of cases concerning direct expropriation, followed by indirect expropriation. Finally, the criteria to make an expropriation lawful will be discussed.

5.10.2.4. Direct Expropriation

Only a few ECT tribunals have addressed direct expropriation. A case where the tribunal accepted a claim of direct expropriation is the *Kardassopoulos v. Georgia* case.

The tribunal established that 'a classic case of direct expropriation' had taken place.[512] In this case, claimants jointly owned a company that had formed a joint

508. Annex B.13(1), Canada Model BIT, 2004. Annex B, US Model BIT, 2012.
509. Article 12(3), Netherlands Model BIT, 2019. Article 1(b), Belgium-Luxembourg Model BIT, 2019. Annex 8-A (1)(b), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Annex 1(1), EU-Singapore Investment Protection Agreement (adopted 19/10/2018, entrance into force still pending). Annex 4 (1)(b), EU-Vietnam Investment Protection Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending).
510. Award, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, 2016. Para. 300.
511. Ibid. Para. 301.
512. Award, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, 2010. Para. 387.

venture – called GTI – with a Georgian SOE. In 1993, this joint venture obtained a 30-year concession over Georgian oil pipelines.[513] However, three years later the concession would be terminated by a Cabinet Decree and some of GTI's rights would be turned over to a consortium of international oil companies, essentially because this consortium could offer 'a better deal' to the Georgian government.[514] Demands for compensation by the foreign investors were rejected by Georgian authorities in a domestic review procedure.[515]

Under these circumstances, the tribunal established that an unlawful direct expropriation had taken place. Also, the tribunal found that this expropriation was not 'an exercise of the State's *bona fide* police powers.'[516]

5.10.2.5. Indirect Expropriation

A much more contested issue in ECT arbitration is indirect expropriation. In practice, this concept has been interpreted and applied quite consistently. Most tribunals have required a 'substantial deprivation' of the attributes of ownership to establish indirect expropriation.

An example of a successful indirect expropriation claim can be found in the *Yukos* cases. The former shareholders of the Yukos Oil Company had argued that the imposition of excessive tax bills by the Russian authorities had driven the company into bankruptcy. According to the tribunal, 'the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.'[517] Since the Russian authorities had not 'explicitly expropriated Yukos or the holdings of its shareholders' the measures amounted to indirect expropriation that was unlawful since the four cumulative conditions of Art. 13 had not been satisfied.[518]

The other claims of indirect expropriation were less successful. Nevertheless, the interpretations of the tribunals in these cases are of interest. From a

513. Ibid. Para. 95.
514. Ibid. Para. 393.
515. Ibid. Paras. 205-207.
516. Ibid. Para. 387.
517. Final Award, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, 2014. Paras. 756 & 1579. Final Award, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2014. Paras. 756 & 1579. Final Award, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case 2005-05/AA228, 2014. Paras. 756 & 1579.
518. Ibid. Para. 1580.

review of arbitral practice in this regard it appears that most tribunals adopt an interpretation of the sole effects doctrine by emphasizing the necessity of a substantial deprivation of the attributes of ownership to establish indirect expropriation. This can be seen in *Nykomb v. Latvia, Plama v. Bulgaria, Liman Caspian Oil v. Kazakhstan, Electrabel v. Hungary, AES v. Hungary, Mohammad Ammar Al-Bahloul v. Tajikistan, Mamidoil v. Albania, Charanne v. Spain, Isolux v. Spain,* and *Foresight v. Spain.*[519]

Less unequivocal in laying down the applicable standard of review were the tribunals in *Petrobart v. Kyrgyz Republic* and *Blusun v. Italy*.[520] Although the latter tribunal did refer to cases where the sole effects doctrine was adopted, it held that in the case at hand:

> "[…] the Respondent, by non-discriminatory laws ostensibly passed in the public interest, significantly changed the terms laid down in the Third Energy Account for investment in the green energy sector. These changes, combined with operational decisions made by the investors and the lack of prearranged Project financing, meant that the Project remained radically incomplete, never qualified for feed-in tariffs, and inevitably went into liquidation. As a general matter the

519. Arbitral Award, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, 2003. Para. 4.3.1. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Paras. 191-193. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 293. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Paras. 6.53-6.64. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 14.3.1. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Paras. 279-281. Award, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, 2015. Paras. 559-572. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 456-467. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 835-839. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 429. Krista N. Schefer, *International Investment Law: Text, Cases and Materials* (Edward Elgar 2016). P. 242.

520. Arbitral Award, *Petrobart Limited v. The Kyrgyz Republic,* SCC Case No. (126/2003), 2005. P. 77. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Paras. 398-400.

> situation was not analogous, still less tantamount, to expropriation of the Project by Italy."[521]

The emphasis on the public interest and the fact that the measures were applied in a non-discriminatory manner recalls elements of the police powers doctrine.

5.10.2.6. Criteria of Lawfulness

Since in both the *Yukos* cases and the *Kardassopoulos v. Georgia* case the tribunals held that an expropriation had taken place, it was necessary in these cases to analyze whether the expropriation was lawful. As held by the *Liman Caspian Oil v. Kazakhstan* tribunal, for an expropriation to be lawful the conditions of Art. 13(1) have to be satisfied.[522]

The *Yukos* tribunal held, firstly, that it was 'profoundly questionable' whether the expropriation was in the public interest.[523] Although the SOE Rosneft would eventually take over much of Yukos' assets 'virtually cost-free', that 'is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation.'[524] Secondly, the tribunal also believed that the expropriation 'may well have been discriminatory' since the treatment accorded to Yukos was different than the treatment accorded to other Russian oil companies such as Rosneft and Gazprom.[525] In the end, the tribunal did not fully decide on this matter. Thirdly, the expropriation of Yukos was not 'carried out under due process of law' for many reasons, such as the 'harsh treatment' accorded to various Yukos officials, 'the mistreatment of counsel of Yukos', and the fact that the 'pace of the legal proceedings' did not 'comport with the due process of law.'[526] The tribunal was of the opinion that 'Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor.'[527] Finally, the tribunal concluded that it was 'incontestable' that the respondent did not compensate the investors for the expropriation.[528]

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521. Ibid. Para. 401.
522. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 293.
523. Final Award, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2014. Para. 1581.
524. Id.
525. Ibid. Para. 1582.
526. Ibid. Para. 1583.
527. Id.
528. Ibid. Para. 1584.

Since the requirements of Art. 13 ECT of a lawful expropriation were not met by Russia, it was in breach of its international obligations and, hence, liable under international law.[529]

In the *Kardassopoulos* case, the tribunal started by emphasizing that demands for compensation by the foreign investors were rejected by Georgian authorities in a domestic review procedure.[530] The tribunal therefore quickly noted that it was 'undisputed that the Georgian Government never compensated Mr. Kardassopoulos for the taking of GTI's rights, let alone met the standard of "*prompt, adequate and effective compensation*" as prescribed in Article 13(1).'[531]

In addition, the tribunal was of the opinion that the expropriation had not taken place in accordance with due process of law.[532] According to the tribunal, due process of law in the context of expropriation, demands:

> "[…] an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "*the actions are taken under due process of law*" rings hollow. And that is exactly what the Tribunal finds in the present case."[533]

The tribunal labelled the process accorded to claimants as 'opaque' and especially criticized Georgia for failing to 'grant Mr. Kardassopoulos a

529. Ibid. Paras. 1584-1585.
530. Award, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, 2010. Paras. 205-207.
531. Ibid. Para. 389.
532. Ibid. Para. 404.
533. Ibid. Para. 395. The tribunal quotes: Award of the Tribunal*, ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, 2006. Para. 435.

reasonable chance within a reasonable time to have his claim heard following the expropriation'.[534]

The public interest requirement was satisfied in this case according to the Tribunal, which also acknowledged that the State 'is entitled to a measure of deference in this regard.'[535] The tribunal also did not consider that the expropriation had taken place in a discriminatory manner.[536] Regarding the non-discrimination requirement, the tribunal held that discriminatory intent is not required to satisfy this criterion.[537]

In conclusion, any expropriation claim will thus be analyzed as follows: first, the tribunal will examine whether an expropriation has taken place. In ECT cases concerning indirect expropriation, the application of the sole effects doctrine in some form seems to be the prevailing method to distinguish expropriatory from non-expropriatory measures. Secondly, if it is established that expropriation has taken place the tribunal will examine the conditions to determine whether the expropriation was lawful.

5.10.3. Relevance for Renewable Energy Investors

The jurisprudence on Art. 13 ECT shows that the threshold of liability is high: an investor has to be deprived of its investment, the value and control thereof, to a substantial or significant degree. Reduced profitability in itself does not suffice. This means that for RES investors that are confronted with governmental measures that reduce the economic viability of their investment, by reducing FIT's for example, a claim based on expropriation may not be credible, as is already shown by the *Charanne v. Spain, Isolux v. Spain, Novenergia v. Spain, Foresight v. Spain, 9REN Holding v. Spain* and *Blusun v. Italy* cases.[538]

In these cases, the control and ownership over the investment is often in no way impaired despite the fact that these measures may affect the economic viability of an investment. In that sense, the currently pending RES cases against Italy, Spain, and the Czech Republic have much in common with the ECT cases brought by

534. Award, *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, 2010. Paras. 397 & 404.
535. Ibid. Para. 391.
536. Ibid. Para. 393.
537. Id.
538. See for example: Award, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, 2019. Paras. 369-372.

Electrabel and AES against Hungary. In these cases, Hungary terminated PPA's which led to reduced income for the electricity generators, in the same way as reduced FIT's lead to reduced revenues for RES investors. However, the ECT tribunals refused to label the termination of PPA's as expropriation because it did not sufficiently deprive the investors of their investment and it left the ownership rights of the investors over their electricity generation facilities completely intact.[539] A similar line of reasoning can be applied in the RES cases as well.

In *Charanne v. Spain,* for example, the claimants argued that reduced government support had such a 'brutal impact on the profitability of the activity' of their investment that it constituted 'an expropriaton of a substantial part of the value and of the returns on the investment.'[540] Despite the fact that the measures did not affect the ownership of their investment, the claimants still believed that the threshold of liability was met since 'total destruction of the investment or loss of control is not required […] a significant interference with the enjoyment of the investment or its profits can be enough.'[541]

Applying the sole effects doctrine to the facts of the case, the tribunal first pointed out that the governmental measures that had the effect of reducing support to PV facilities did not affect the property rights of the investors since their shares in a Spanish corporation, T-Solar, were not affected or limited.[542] Furthermore, the company in which the claimants had invested was still making a profit.

While the tribunal did concur with the claimants that a loss of value of an investment or loss of control over it may constitute indirect expropriation, the loss of value 'has to be of such a magnitude as to amount to a deprivation of property.'[543] This would only be the case when the value of the investment has been destroyed.[544] In the case at hand the tribunal accepted that the measures

539. Award*, AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Para. 14.3.2. Decision on Jurisdiction, Applicable Law and Liability*, Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2012. Para. 6.64.
540. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 456.
541. Id.
542. Ibid. Paras. 460-462.
543. Ibid. Para. 464.
544. Id.

may have had a 'serious economic and financial' impact, but this did not destroy the value of the investment.[545] The claim was consequently rejected.

Furthermore, one may question the likelihood that States adopt measures that would meet the high threshold of liability of expropriation in the RES sector. After all, the exploitation of RES does not involve the same sensitive considerations as the exploitation of hydrocarbons: contrary to RES, hydrocarbons are finite. In addition, it is difficult to claim ownership over RES whereas this is an important issue in relation to hydrocarbons. Neither can it be said that the exploitation of most RES is accompanied by the same detrimental external effects as the exploitation of hydrocarbons.

Perhaps the main exception to this in the RES sector is hydropower. The potential of hydropower in a State is often limited due to the fact that the number of favorable sites is limited. Also, the exploitation of hydropower can have very significant external effects for both humans and the environment. In France, for example, hydropower is considered as a 'rare natural resource.'[546] In various countries, the exploitation of hydropower is therefore regulated by a concession regime.[547] The duration of hydropower concessions can vary greatly, from a few years to an unlimited period of time.[548]

As the *Kardassopoulos v. Georgia* case illustrates, the termination of a concession can 'present a classic case of expropriation' under the ECT.[549] In addition, contractual rights may also be protected under the ECT if the State terminates the contract or definitively refuses to perform its obligations.[550] In fact, that the taking of contractual rights is contrary to international law, and

545. Ibid. Para. 466.
546. Thierry Lauriol, 'Energy Law in France' in Martha M. Roggenkamp *et al* (eds.), *Energy Law in Europe – National, EU and International Regulation* (Oxford University Press 2016). P. 542.
547. Ibid. Pp. 542-543. See also: Finn Arnesen, Ulf Hammer, Per Håkon Høisveen, Knut Kaasen & Dagfinn Nygaard, 'Energy Law in Norway' in Martha M. Roggenkamp *et al* (eds.), *Energy Law in Europe – National, EU and International Regulation* (Oxford University Press 2016). Pp. 860-862.
548. Jean-Michel Glachant, Marcelo Saguan, Vincent Rious & Sébastien Douguet, 'Regimes for Granting the Right to Use Hydropower in Europe' (European University Institute, 2015). <http://cadmus.eui.eu/bitstream/handle/1814/37519/Glachant_Saguan_Rious_Douguet.pdf?sequence=1> accessed on 13/01/2017.
549. Award, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, 2010. Para. 387.
550. Partial Award on Jurisdiction and Liability, *Mohammad Ammar Al-Bahloul v. the Republic of Tajikistan,* SCC Case No. V (064/2008), 2009. Para. 281.

may amount to expropriation, has been acknowledged by various international claims commissions, tribunals, and courts since the early 20th century.[551] It is a widely held view that in order for the violation of a contract or concession to amount to an expropriation, the State has to act in its 'public capacity' or make use of its 'public authority.'[552] Also, in order to bring a successful expropriation claim in cases involving concessions or contracts, it is important to establish that the contract or concession gave rise to 'an asset owned by the claimant to which monetary value can be ascribed', since it is the asset and not so much the contractual source that gave rise to the expropriation claim.[553]

Several investment disputes, brought under various IIA's, involved hydroelectric projects although not a single dispute has so far resulted in an award on the merits.[554]

Several investors have relied on the ECT in disputes involving the hydroelectric sector. First of all, there are the *Uzan* cases: various claims brought by different

551. See for example: Decision on Merits, *Rudloff Case,* American-Venezuelan Mixed Claims Commission, 1903. P. 250. <http://legal.un.org/riaa/cases/vol_IX/113-318.pdf> accessed on 17/01/2017. Award of the Tribunal, *Norwegian Shipowners' Claims (Norway v. United States of America),* PCA Case No. 1921-01, 1922. Pp. 18 & 28. Award, *Phillips Petroleum Company v. Iran*, Award No. 425-39-2, 21 Iran-United States Claims Tribunals Reports 1990. Para. 105. Award, *Amoco International Finance Corporation v. Iran,* Award No. 310-56-3, 15 Iran-United States Claims Tribunal Reports 1988. Para. 108. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 267. *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Judgment, 1926, *PCIJ Reports,* Series A, No. 7 (1926). Pp. 44. Decision No. 13-E, *Claim of Jalapa Railroad and Power Co.,* US-Mexican Claims Commission. As quoted in: Marjorie M. Whiteman, 8 Digest of International Law 1967. Pp. 908-909. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 126-129.

552. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 126-129. Irmgard Marboe, 'Valuation in Cases of Expropriation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 1064-1065. Decision on Jurisdiction, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 2005. Para. 281. Award, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, 2007. Para. 253. Sentence Arbitrale, *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, 2003. Para. 65. Award, *Waste Management, Inc. v. United Mexican States ("Number 2"),* ICSID Case No. ARB(AF)/00/3, 2004. Paras. 174-175.

553. Award, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, 2014. Para. 169.

554. Attila Tanzi, 'International Law and Foreign Investment in Hydroelectric Industry: A Multidimensional Analysis' [2016] 18 International Community Law Review 183. P. 188.

companies and Cem Uzan against Turkey.[555] All of these cases, where the claims added up to almost USD 20 bln, were rejected on jurisdictional grounds.

In all the *Uzan* cases, the claimants argued – unrightfully so – that they were shareholders of two Turkish companies called CEAS and Kepez.[556] These companies were progressively privatized between the 1950's and 1990's and were involved in the generation, transmission, distribution and supply of electricity in various regions of southern Turkey.[557] The companies were amongst the largest hydroelectric companies in Turkey.[558]

In 1998 both companies entered into new concession agreements with the Turkish government, on the basis of which both companies were granted the right to operate the companies for 60 years, until 2058.[559] In 2003 the concessions were terminated and the assets were seized by the Turkish authorities, the claimants argued that compensation had never been paid for this direct expropriation.[560] Since the claimants in all the *Uzan* cases failed to provide evidence that they

555. See: Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Award, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, 2009. Award, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, 2009. Cem Uzan also brought a claim at the SCC, which he allegedly lost. See: Jarrod Hepburn, 'Latest Uzan v. Turkey Arbitration Fails, as SCC Tribunal looks past Claimant's Permanent Residence in France and Dwells on 'Domestic' Origins of Disputed Investment' (IA Reporter, 2016). <http://www.iareporter.com/articles/latest-uzan-v-turkey-arbitration-fails-as-scc-tribunal-looks-past-claimants-permanent-residence-in-france-and-dwells-on-domestic-origins-of-disputed-investment/> accessed on 17/01/2017.aganization, Iranian Air Force, be applied in the Solar Panel cases as well.Hollandand Budget Organization, Iranian Air Force,
556. Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Paras. 88-97 & 530-536. Award, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, 2009. Paras. 3 & 149. Award, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, 2009. Paras. 2 & 120.
557. Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Para. 90.
558. Stephen Jagusch & Jeffrey Sullivan, 'Arbitration Under the Energy Charter Treaty: Recent Decisions and a Look to the Future' in Graham Coop *et al* (eds.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (JurisNet 2011). P. 77.
559. Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Para. 92.
560. Ibid. Para. 95. Stephen Jagusch & Jeffrey Sullivan, 'Arbitration Under the Energy Charter Treaty: Recent Decisions and a Look to the Future' in Graham Coop *et al* (eds.), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (JurisNet 2011). P. 77.

acquired shares in CEAS and Kepez before the expropriation took place, all claims were rejected for a lack of jurisdiction.[561]

Secondly, there is currently one ECT hydro dispute pending against Bosnia and Herzegovina.[562] Although little information is available in relation to this case, it allegedly concerns the termination of a concession to construct hydroelectric facilities that were not built.[563]

Another hydro case is *Impregilo v. Pakistan,* based on the Italy-Pakistan BIT. In this case, the Italian company Impregilo participated in a joint venture called GBC, which was incorporated under Swiss law.[564] The purpose of the joint venture was to participate in tenders in Pakistan for the construction of hydroelectric facilities.[565] On the basis of two contracts, concluded between GBC and the Pakistan Water and Power Development Authority in 1995, GBC was supposed to construct a barrage that would control the flow of the Indus River and a 52 kilometer channel that would convey water from the barrage to a powerhouse.[566] Completion of the projects was delayed due to various obstacles created by Pakistan and unforeseen conditions in the project.[567] Attempts to settle the dispute in accordance with the contracts were frustrated by Pakistan.[568]

Amongst other claims, Impregilo argued that the failure of Pakistan to 'honor the Contracts had destroyed the value of Impregilo's investment' in violation of the BIT's expropriation provision.[569] The tribunal would establish, however, that 'only measures taken by Pakistan in the exercise of its sovereign power ("*puissance*

561. Award, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, 2011. Paras. 88-97 & 530-536. Award, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, 2009. Paras. 3 & 149.. Award, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, 2009. Paras. 2 & 120.
562. *Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček v. Bosnia and Herzegovina*, ICSID Case No. ARB/16/36.
563. Luke Eric Peterson, 'Bosnia and Herzegovina is Hit with Treaty-Based Claim over Hydroelectric Project' (IA Reporter, 2016). <http://www.iareporter.com/articles/bosnia-herzegovina-is-hit-with-treaty-based-claim-over-hydroelectric-project/> accessed on 17/01/2017.
564. Decision on Jurisdiction, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 2005. Para. 10.
565. Ibid. Para. 8.
566. Ibid. Para. 13.
567. Ibid. Para. 15.
568. Ibid. Para. 22.
569. Ibid. Para. 34.

publique"), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation.'[570] This case would not reach the merits stage since it was settled in 2005 when Pakistan agreed to pay USD 98 mln to GBC.[571]

Another attempt by an investor to claim damages in a hydro case on the basis of expropriation is the NAFTA case *AbitibiBowater v. Canada*. Although this case would not reach the merits stage either, the investor obtained a settlement in its favor of USD 130 mln, making it one of the largest settlements under NAFTA Chapter 11.[572] AbitibiBowater, a forestry company, owned and operated several hydroelectric facilities and decided to close one of its plants in Canada and lay off a significant number of workers.[573] As a reaction, the local authorities enacted legislation that expropriated a significant number of AbitibiBowater's assets, including water- and hydroelectric contracts.[574] According to AbitibiBowater itself, the effect of the Act of the Province of Newfoundland and Labrador was the 'immediate expropriation of most of AbitibiBowater interests in the Province.'[575]

If the *AbitibiBowater* case had made it to the merits stage it is quite likely that a tribunal would have found that the legislative measures taken by the Province of Newfoundland and Labrador in its 'Abitibi – Consolidated Rights and Asset Act' amounted to expropriation.[576] After all, not only did these measures expropriate physical assets of the investor, they also cancelled water rights associated with

570. Ibid. Para. 281.
571. Order of Discontinuance of the Proceeding, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, 2005. Para. 4.
572. Statement on AbitibiBowater Settlement, 24-8-2010. <http://www.italaw.com/sites/default/files/case-documents/ita0235.pdf> accessed on 13/01/2017. Bertrand Marotte, 'Ottawa Pays AbitibiBowater $130-million for Expropriation' (The Globe and Mail, 2010). <http://www.theglobeandmail.com/report-on-business/ottawa-pays-abitibibowater-130-million-for-expropriation/article1378193/> accessed on 17/01/2017.
573. See: Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, *AbitibiBowater Inc., v. Government of Canada*, 2009.
574. Attila Tanzi, 'International Law and Foreign Investment in Hydroelectric Industry: A Multidimensional Analysis' [2016] 18 International Community Law Review 183. P. 189.
575. Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, *AbitibiBowater Inc., v. Government of Canada*, 2009. Para. 59.
576. See: Tab A, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, *AbitibiBowater Inc., v. Government of Canada*, 2009.

hydro facilities.[577] These water rights were thus cancelled by the Province, acting in its public authority.

Despite the lack of hydro investment cases that resulted in a final award, the fact that several of these cases were settled with the investor receiving a significant amount of damages shows the importance of the expropriation provision to RES investors. Nevertheless, the threshold of liability for claims based on (in)direct expropriation is very high, which means that investors that are merely confronted with measures that reduce the economic viability of their investment, which is the case in most currently pending ECT RES cases, probably cannot successfully invoke Art. 13 ECT.

5.11. Conclusion

After this extensive review of the ECT's investment protection chapter, the fourth sub-question can now (partially) be answered. This question reads in full:

> 'What does the current legal framework of the ECT concerning investment promotion and protection provide for?'

Since this chapter merely discussed the ECT's legal framework concerning investment protection, I will only answer the sub-question with regards to investment protection.

The ECT's investment protection chapter resembles the characteristics of many investment treaties concluded in the early 1990's: the definitions of terms that determine the scope of the treaty, such as those of 'investor' and 'investment' are broad and the investment protection standards are plentiful yet usually undefined. The same holds true for the investment chapter of the ECT, which was initially based on the UK Model BIT of 1991.[578] In practice, arbitral practice

577. Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, *AbitibiBowater Inc., v. Government of Canada*, 2009. Paras. 41 & 61.

578. Compare Articles 18-23, Draft Treaty of the Basic Protocol to the European Energy Charter (20 August 1991) with Articles 2-7, 1991 UK Model BIT. The UK Model BIT was likely taken as inspiration simply because a member of the British delegation was the chairman of the working group where the ECT was being negotiated and, hence, it were the British that initiated the compilation of a full first draft of the treaty. See Letter from Martin Rickerd to Jonathan Cook (23 August 1991), which accompanied the first draft and read, 'I enclose a copy of the first full draft of the Basic Protocol. I think you will agree that Andrew Young, our Legal Adviser, has done an excellent job in pulling together the contributions from around Whitehall into a (remarkably concise) homogenous text.' See also Letter from

has resulted in inconsistent decisions, which may adversely affect legal certainty in the interpretation and application of the treaty.[579] Contemporary IIA's tend to more clearly define comparable provisions or in some cases restrict them or omit them altogether. Even in comparison to the ECT's contemporaries, some notable differences stand out.

- The fact that the ECT is a multilateral treaty negotiated by dozens of parties several of which had their own policy preferences as laid down in various BIT's resulted in a treaty that encompasses provisions not always found in all BIT's of participating States. A notable example of this is Art. 10(12) which is usually found in US BIT's but uncommon in European practice.

- The emphasis on the energy sector, where long term investments are common, is reflected in the treaty provision setting out the purpose of the treaty. This reference to 'long term', which is not usually found in the text of BIT's, could – and has – been used by tribunals to interpret the treaty in a teleological manner.[580] In combination with the undefined standards of investment protection, this could lead to a potentially high level of investment protection.

- In a similar vein, Art. 10(1) first sentence is a provision that is more commonly found in the preamble rather than the operative part of a treaty. The fact that it refers to the notions of stability, equity, favorability, and transparency could equally be used to interpret the ECT teleologically. In comparison to recent IIA's, this could then result in a relatively high level of investment protection that is available under the ECT.

Secretary-General Clive Jones to European Commissioner Cardoso E. Cunha (5 September 1991), which likewise stated, 'The major work during August has been the preparation by the UK of a draft Basic Protocol, in their role as Chairman of Working Group II. In the course of this work they have been supported by the NL Presidency and Conference Secretariat.' See: Cees Verburg, 'Modernising the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement' [2019] 20(2-3) Journal of World Investment and Trade 425. P. 439.

579. Cees Verburg, 'Modernizing the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement [2019] 20(2-3) Journal of World Investment & Trade 425.

580. See for example: Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Paras. 377-378.

Even though the ECT does provide for a relatively high level of investment protection, this does not necessarily mean that it also contributes to increased flows of FDI between the contracting parties. In a recent meta-study, it was found that IIA's that provide for post-establishment investment protection probably have some positive influence on FDI flows although some studies even found a negative link.[581] In light of this, it is also important to analyze the investment promotion provisions of the ECT, which is the subject of the following chapter.

581. Jonathan Bonnitcha, Assessing the Impacts of Investment Treaties: Overview of the Evidence (Winnipeg, mb: iisd, 2017). Pp. 3-4. <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf, accessed 1 November 2018> accessed on 09/06/2019. It has to be noted that these studies 'face a range of methodological challenges' as a result of which the causality between the conclusion of IIA's and flows of FDI is difficult to prove.

CHAPTER 6.

Investment Promotion in Part III of the Energy Charter Treaty

6. INVESTMENT PROMOTION IN PART III OF THE ENERGY CHARTER TREATY

Whereas the previous chapter focused on the investment protection standards of the ECT, this chapter is dedicated to the investment promotion provisions of Part III of the ECT. These provisions have the potential of addressing (discriminatory) barriers to FDI, thereby facilitating flows of FDI between contracting parties. The provisions will be analyzed in the same manner as those relating to investment protection, namely that i) a legal comparison between IIA's will be provided for, followed by ii) an examination of ECT arbitral practice – if there is any – and, finally iii) the relevance for RES investors will be explained. As will be seen, the provisions relating to investment promotion are often phrased in a hortatory manner. As will be concluded, this means that there is potentially room for improvement in the ECT which could be used to facilitate flows of FDI more effectively.

6.1. LIBERALIZATION OF FDI

The first relevant provisions of Part III of the ECT relating to investment promotion are Arts. 10(2) and (3) ECT.[1] These provisions concern 'the making of investments', which is defined in Art. 1(8) ECT as 'establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.' Regarding the making of investments, host States 'shall endeavor to accord investors' non-discriminatory treatment in line with the NT and MFN obligations.[2] However, this commitment is one of 'best endeavors'.[3] Therefore, under the current legal framework of the ECT, investors do not derive benefits from the treaty in the pre-establishment phase of their investment. In other words, ECT contracting parties are currently under no obligation to admit

1. Articles 10(2) and (3) ECT provide for the following:
"(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).
(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable."
2. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 106.
3. Id. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). P. 108.

foreign investors on the basis of the ECT.[4] Whilst Art. 10(4) ECT does contain the ambition for a supplementary treaty that would provide for this, such a treaty has never been concluded.[5]

A draft of this supplementary treaty allowed for establishment of foreign investors on the basis of MFN or NT, whichever was more favorable, subject to certain exceptions.[6] These exceptions primarily concerned issues related to privatization and real estate.[7] In 2002 the negotiators decided to refrain from further negotiating the supplementary treaty while awaiting the conclusion of a WTO Agreement on this issue: trade and investment had been on the Doha Agenda as a so-called 'Singapore Issue' since 1996.[8] However, the WTO members decided in 2004 that trade and investment would be dropped from the Doha Agenda. Negotiations within the ECT have, however, never resumed.

6.1.1. Legal Comparison of IIA's

In the absence of any treaty obligations to the contrary, States have the right to control the in- and outflows of FDI into their jurisdiction by virtue of their sovereignty and are thus 'in no way compelled to admit foreign investment.'[9]

Generally, two different approaches can be identified in IIA's regarding the admission of FDI.[10]

4. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 196.
5. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 106.
6. See: Supplementary Treaty to the Energy Charter Treaty, 1998. <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECST_Text_en.pdf> accessed on 24/03/2017.
7. Thomas Pollan, *Legal Framework for the Admission of FDI* (Eleven International Publishing 2006). P. 108.
8. See: WTO, *Investment, Competition, Procurement, Simpler Procedures*. <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm> accessed on 23/03/2017.
9. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 88. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 191.
10. It has been argued that there is a third approach, namely the approach as adopted on the basis of the EU Treaties which Salacuse has reffered to as 'an absolute right of establishment.' Due to the freedom of establishment and the free movement of capital within the EU, there is no IIA that has gone as far in liberalizing FDI as the EU Treaties. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 203-204.

Firstly, there are IIA's that admit FDI in accordance with the host State's laws and regulations.[11] For example, Art. 2 of the Georgia-Netherlands BIT states:

> "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments."[12]

On the basis of provisions like this one, which are often referred to as 'admission clauses' the host State is under no obligation to liberalize the entry conditions for foreign investors.[13] Therefore, under these clauses, host States are not obliged to treat investors in a similar manner as national investors or investors of third States with regard to the making of investments.[14] Also, these clauses could restrict the jurisdiction of ISDS tribunals in cases where the investment is not made in accordance with national law.[15] Thus, illegal investments or investments made contrary to national law may than not be protected under the treaty.[16]

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11. Article 2, Agreement on Encouragement and Reciprocal Protection of Investments between Georgia and the Kingdom of the Netherlands (Georgia-the Netherlands) (adopted 03/02/1998, entered into force 01/04/1999). Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 11-12. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 196. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). Pp. 88-89
12. Article 2, Agreement on Encouragement and Reciprocal Protection of Investments between Georgia and the Kingdom of the Netherlands (Georgia-the Netherlands) (adopted 03/02/1998, entered into force 01/04/1999).
13. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 12. Decision on Respondent's Objections to Jurisdiction, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, 2005. Para. 147. Award, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, 2007. Para. 335.
14. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 197.
15. Id.
16. Award, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, 2006. Paras. 206 & 257. Award, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, 2007. Paras. 401-404. Decision on Jurisdiction, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, 2007. Paras. 174-182.

Under the second approach which has primarily been adopted by the US, Canada, and Japan, host States' are obliged to accord NT and MFN treatment to foreign investors in the pre-establishment phase of an investment.[17] This approach has also been adopted by the EU in several recent FTA's.[18] As Art. 2(1) of the US-Bahrain BIT states:

> "With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favored nation treatment"), whichever is most favorable (hereinafter "national and most favored nation treatment"). Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favored nation treatment to covered investments."[19]

Nevertheless, this obligation may be subject to exceptions laid down in the treaty.[20] Thus, when deciding whether or not to admit FDI, a host State which is bound by this obligation must treat investors from its treaty partners in the

17. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 199-202. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 13. Article 2, Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001).
18. Articles 8.4, 8.6 & 8.7, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Articles 8.4, 8.5 and 8.6, EU-Vietnam Free Trade Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending). Maria Laura Marceddu, 'The Emerging Profile of the European IIAs' [2016] 13 Transnational Dispute Management 1. Pp. 13-14.
19. Article 2(1), Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001).
20. Article 2(2), Treaty between the Government of the United States of America and the Government of the State of Bahrain concerning the Encouragement and Reciprocal Protection of Investment (United States-Bahrain) (adopted 29/09/1999, entered into force 30/05/2001). Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 199-202. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 13.

same way as its own investors or the investors of other countries.[21] According to Joubin-Bret, this constitutes a limitation on the State's right to regulate FDI.[22]

In some cases, an IIA contains a provision that provides for a combination of both approaches by, in principle, providing for an admission clause but with an attached MFN obligation.[23]

As said, the ECT merely contains a soft-law obligation to provide non-discriminatory treatment in the pre-establishment phase of an investment. Also, Art. 10(5) prescribes that States shall endeavor to 'limit to the minimum the exceptions' to the non-discriminatory treatment prescribed in Art. 10(3) while also stating that States shall strive to 'progressively remove existing restrictions affecting Investors of other Contracting Parties.' Furthermore, Art. 10(6) ECT provides contracting parties with the possibility of voluntarily notifying to the Energy Charter Conference that it will not introduce new exceptions to non-discriminatory treatment under Art. 10(3) or that it will voluntarily provide non-discriminatory treatment to foreign investors in some or all economic activities of the energy sector. Finally, Art. 10(9) ECT states that upon accession to the ECT, contracting parties shall submit a report to the ECT Secretariat that summarizes all laws, regulations or other measures that contain exceptions to the MFN and NT obligations regarding the making of investments.[24]

During the negotiations of Art. 10 ECT, the inclusion of pre-establishment rights was one of the most contested issues. An early draft of the ECT provides for pre-establishment rights on the basis of both MFN and NT.[25] For countries with SOE's that were active in the energy sector and which were accorded significant privileges, such as the former Communist countries and Norway, this was problematic. For Norway for example, an unfettered NT obligation in the

21. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 201.
22. Anna Joubin-Bret, 'Admission and Establishment in the Context of Investment Protection' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 13.
23. Ibid. P. 12-13. Article 2, Agreement Between Japan and the People's Republic of Bangladesh Concerning the Promotion and Protection of Investment (Japan-Bangladesh) (adopted 10/11/1998, entered into force 25/08/1999).
24. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 106-107.
25. Article 13(2), CONF 56, Draft ECT – Second version, 1 May 1993. <http://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/16_-_ECT_2__01.05.93_.pdf> accessed on 09/12/2016.

pre-establishment phase would have required it to accord treatment to foreign investors in its oil and gas sector comparable to the treatment accorded to Statoil (nowadays Equinor).[26] The US was on the other side of the spectrum, arguing that 'liberal rights of establishment' were essential since very few foreign investors were established in the former USSR, and Eastern and Central Europe.[27] Hence, achieving the goals of the ECT would require thousands of investors to 'set up shop' in these countries.[28]

The ECT's current legal framework with regard to the admission of FDI provides for non-discriminatory treatment in the pre-establishment phase of an investment but on a voluntary – best endeavors – basis.[29] Besides the fact that the ECT does not provide substantive rights to investors in the pre-establishment phase, there is also a jurisdictional hurdle to be overcome if investors want to refer a dispute to ECT arbitration. To establish jurisdiction for an ECT tribunal, Art. 26(1) requires that there is a dispute between a contracting party and an investor concerning an investment. However, if an investor would bring a claim regarding the discrimination accorded to it in the pre-establishment phase, the main problem is the fact that it is not able to make an investment in the first place.[30] Therefore, it might be very difficult to establish jurisdiction on the basis of the ECT for investors that are unable to make an investment.

6.1.2. Relevance for Renewable Energy Investors

The fact that the ECT's current legal framework does not provide for pre-establishment rights can be considered as a shortcoming simply because, currently, ECT contracting parties are under no obligation to admit RES investors from other contracting parties. In that regard, the ECT is more an investment protection agreement rather than one that actively promotes FDI by providing for liberalization and market access commitments.

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26. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 10. See for a Norwegian attempt to omit the reference to NT in the pre-establishment paragraphs: the general comments to Art. 16, BA-37, Basic Agreement, 1 March 1993. <http://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/14_-_BA_37__01.03.93_.pdf> accessed on 16/02/2017.
27. Comments on Article 10(d) of Basic Agreement, United States Department of State, letter of 30/10/1991, Binder 1/4 Article 10, BP3 11/10/1991.
28. Id.
29. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 201-202. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 106-107.
30. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 106-107.

Nearly all of the currently pending ECT RES investment disputes are intra-EU, meaning that both the home State of the investor as well as the host State are an EU Member State. This could suggest that within the EU a lot of cross-border investments are made in the RES sector. Arguably, EU law, more specifically the right of establishment and the free movement of capital, creates an 'open door' for intra-EU FDI.[31] Thus, EU law provides for market access of EU investors which facilitates cross-border investment.[32] The ECT does not even contain obligations that are remotely comparable to the obligations under EU law nor does it reduce barriers to investment. Rather, it is in the post-establishment phase of an investment that the ECT becomes an interesting legal instrument for investors by providing investors with protection and an ISDS mechanism to enforce these rights under the ECT. Also, the fact that energy markets within the EU are liberalized significantly reduces investment barriers for market entrants.

For foreign investors in the RES sector the lack of pre-establishment rights means that they may be treated differently from domestic and/or foreign investors from third countries when making an investment. Thus, they may be discriminated in tender procedures and other measures that favor domestic investors over foreign ones, such as LCR's, may be adopted by the host State.[33] This may discourage foreign investors from competing in foreign tenders which reduces competition in the RES sector. Also, companies that are internationally active in the RES services sector often provide services abroad through the establishment of a commercial presence, which requires an investment. However, as identified by the OECD, foreign RES services supplier are often not able to compete on a level playing field with domestic suppliers because of restrictions on FDI, including economic needs tests, foreign equity limits, nationality or residency requirements, restrictions on the acquisition of land and real estate, and investment screening procedures.[34] Therefore, the failure of the ECT to address barriers to investment

31. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 203-204. Articles 49 & 63, Treaty on the Functioning of the European Union (adopted 13/12/2007, entered into force 01/12/2009).
32. Catherine Barnard, *The Substantivew Law of the EU – The Four Freedoms* (Oxford University Press 2010). Pp. 322-323, 559-584.
33. Thomas W. Wälde and Walid Ben Hamida argued in 2008 that a public tender offer - in the context of corporate acquisition - could qualify as 'investment.' See: Thomas W. Wälde & Walid Ben Hamida, 'The Energy Charter Treaty and Corporate Acquisition' in Graham Coop *et al* (eds.), *Investment Protection and the Energy Charter Treaty* (JurisNet 2008). Pp. 190-204.
34. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). Pp. 10-11.

in the pre-establishment phase of an investment is a significant shortcoming of the current legal framework.

6.2. TRANSFER OF FUNDS

On the basis of Art. 14, contracting parties shall 'guarantee the freedom of transfer into and out of its Area.' Provisions regarding the transfer of funds are common in IIA's. For investors, this provision is of profound importance since it establishes the right to transfer funds into the host State, in order to make the investment, as well as out of the host State.[35] After all, an important reason for investors to invest abroad is to obtain a higher rate of return than which is possible at home; repatriating profits is therefore of pivotal importance to investors.[36] Nevertheless, the interests of the host State may well diverge from the interests of the investor. As Dolzer and Schreuer stated:

> "The host state will want to administer its currency and its foreign reserves. Large currency transfers into and out of the country need to be monitored and controlled in order to protect national policies. Experience has shown that sudden short-term capital inflows, and especially capital flight, may lead to instability in the domestic financial markets."[37]

This section will analyze Art. 14 ECT by reference to other IIA's, ECT arbitral practice, and explain how this provision is relevant for RES investors. Since investment disputes involving transfer of funds provisions most often originate in the wake of mayor economic and financial crises that force States to adopt capital restrictions, these disputes are not so much typical 'RES' disputes, but rather disputes arising from exceptional circumstances.[38]

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35. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 212. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 256.
36. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 871. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 213-214.
37. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 212.
38. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 217. See, for example: Award, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, 2008. Paras. 237-245.

6.2.1. Legal Comparison of IIA's

From the outset, it is important to note that the transfer of capital may be regulated by various international instruments, such as the Articles of Agreement of the International Monetary Fund (IMF), the OECD Convention, EU law, and WTO law.[39] According to Kern, the common denominator of all these instruments is that they allow States to adopt capital restrictions under certain circumstances.[40] An interesting, yet unsettled, discussion is how all of these instruments relate to IIA's, especially when the text of an IIA does not contain any exceptions to the freedom of transfer.[41] In the *Continental Casualty v. Argentina* case, for example, the ICSID tribunal considered the applicable BIT to be a more liberal *lex specialis* to the IMF Articles.[42]

Turning to IIA's, even though transfer of funds provisions can commonly be found in IIA's, they are by no means uniform.

A first difference relates to the direction in which the freedom of transfer applies. For example, the BIT between Belgium-Luxembourg and Hong Kong only provides for the transfer of funds out of the host State.[43] The ECT, on the other hand, explicitly states in Art. 14(1) that the freedom of transfer applies 'into and out of' the area of a contracting party, thereby covering both directions. According to Dolzer and Schreuer, most IIA's cover the transfer of funds in both directions.[44]

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39. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 872-876. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 206.
40. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 876.
41. Ibid. Pp. 880-881. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 214. Anna de Luca, 'Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT' [2014] 15 Journal of World Investment & Trade 506. P. 528. Michael Waibel, 'BIT by BIT: the Silent Liberalization' in Christina Binder *et al* (eds.), *International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer* (Oxford University Press 2009). P. 517.
42. Award, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, 2008. Para. 244.
43. Article 6(1), Agreement Between the Government of Hong Kong and the Belgo-Luxembourg Economic Union for the Promotion and Protection of Investments (Belgium/Luxembourg-Hong Kong) (adopted 07/10/1996, entered into force 18/06/2001).
44. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 214.

A second important point is related to the scope of the provision. Many IIA's state that the funds that benefit from the freedom of transfer must be related to the investment, followed by a non-exhaustive illustrative list that contains transactions that are covered by the treaty.[45] According to Salacuse, the ECT's reference to 'a general 'freedom of transfer' […] appears to have been influenced by the Netherlands Model BIT.'[46] It has been said that the scope of Art. 14 ECT as such is 'very broad' and includes, amongst others, the right of transfer for personnel.[47]

A third issue, and perhaps the most contested one, is related to the exceptions and restrictions on the transfer of funds. Various approaches exist in relation to this point. For example, some treaties, contain provisions that allow for the free transfer of funds 'unrestrained' by the domestic law or economic circumstances of the host State.[48] It is currently unclear whether these treaties nevertheless allow States to impose transfer restrictions in times of economic and financial instability on the basis of either customary international law, such as the "state of necessity doctrine", or the IMF Articles.[49] Under another approach, which is the complete opposite, the right to transfer funds is subjected to the laws and regulations of the host State.[50] This approach essentially allows host States to adopt restrictions on the transfer of funds 'irrespective of economic circumstances or obligations

45. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 876-877. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 214. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 258.
46. In particular the 1979 Netherlands Model BIT. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 258. See, for example: Article 6, Accord Relatif à l'encouragement et la Protection des Investissements Entre le Royaume des Pays-Bas et la République du Sénégal (Netherlands-Senegal) (adopted 03/08/1979, entered into force 05/05/1981).
47. Anna de Luca, 'Umbrella Clauses and Transfer Provisions in the (Invisible) EU Model BIT' [2014] 15 Journal of World Investment & Trade 506. P. 525. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 259.
48. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 213-214. See also: Article 5, Germany Model BIT, 2008. Article 7(1), Agreement Between the Government of the Republic of Finland and the Government of the Federative Republic of Brazil on the Promotion and Protection of Investments (Finland-Brazil) (adopted 28/03/1995, entrance into force still pending).
49. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 214-215, 217-227. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 878-879.
50. Id. Article 6(1), Agreement Between the Government of the People's Republic of China and the Government of the State of Kuwait for the Promotion and Protection of Investments (China-Kuwait) (adopted 23/11/1985, entered into force 24/12/1986).

under other international treaties.'[51] A middle ground between these two divergent approaches can be found in the third approach which provides for exceptions to the transfer of funds in cases of balance of payments problems.[52] The final approach allows States to restrict the transfer of funds through measures that are taken in line with the WTO Agreements and/or the IMF Articles.[53]

It has been said that the ECT follows the first approach.[54] However, the present author cannot completely concur with this statement. For example, Art. 14(4) ECT states, somewhat in line with the second approach, that 'a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, nondiscriminatory, and good faith application of its laws and regulations.' In addition, the transfer of returns in kind, such as payments in crude oil, may be restricted when the GATT exceptions allow for this on the basis of Art. 14(6) ECT. Finally, on the basis of Art. 14(5) ECT payments within the former USSR may be regulated differently, provided that there is agreement between the parties involved. Thus, although Art. 14(1) ECT seems to provide for an absolute freedom of transfer of funds, subsequent paragraphs contain at least three exceptions, on the basis of which one cannot say that the freedom is completely unrestricted.

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51. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 878-879. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 215.
52. Article 6, Agreement Between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments (France-Uganda) (adopted 03/01/2003, entered into force 20/12/2004). Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). Pp. 878-879. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 215. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 215.
53. Article 14(7), Canada Model BIT, 2004. Article 6.7, Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore (India-Singapore) (adopted 29/06/2005, entered into force 01/08/2005). Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 880. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 216.
54. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 214. Carsten Kern, 'Transfer of Funds' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 878.

In line with common treaty practice, Art. 14 ECT states that the transfer 'shall be effected without delay' and in a freely convertible currency at the 'market rate of exchange existing on the date of transfer.'[55] The ECT adds to this that in 'the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into special drawing rights, whichever is more favourable to the investor.'[56]

6.2.2. ECT Arbitral Practice

The only ECT case where an investor put forward a claim based on Art. 14 is *AES v. Kazakhstan.* Kazakhstan had imposed a so-called 'tariff in exchange for investment' scheme which obliged investors to re-invest operating revenue back into their electricity generation facilities.[57] Consequently, investors were unable to make use of their income in any other way than re-investing it. The tribunal would eventually conclude that this measure violated the FET standard, but the tribunal also touched upon Art. 14, although its analysis was limited to the question of whether Art. 14 would 'provide any additional protection to Claimants justifying to examine a separate breach of such provisions.'[58]

The tribunal held that Art. 14 ECT represents 'a specific implementation of the general principle protected under the FET standard that an investor should have the right to earn and transfer reasonable returns of and on its investments.'[59] This means that the protection of Art. 14 goes further than the protection under the FET standard since Art. 14 establishes 'more specific principles concerning the conditions to transfer of such returns and other capital.'[60] Consequently, not all breaches of Art. 14 will amount to breaches of the FET standard while all breaches of the FET standard will amount to a breach of Art. 14, to the extent that they restrict earnings and the transfers of reasonable returns.[61] The tribunal therefore concluded, albeit in a rather cryptic manner, that Art. 14 was breached.

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55. Article 14(2)(3), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998). Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 214.
56. Article 14(3), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
57. Award, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, 2013. Para. 405.
58. Ibid. Para. 424.
59. Ibid. Para. 425.
60. Id.
61. Ibid. Para. 426.

6.2.3. Relevance for Renewable Energy Investors

Like all investors in the energy sector, RES investors have an interest in the freedom to transfer funds. However, most ISDS disputes regarding a transfer of funds provision seem to have originated in the wake of economic and/or financial crises.[62] Therefore, disputes regarding transfer of funds do not seem to be inherently related to RES investments, but rather to investing abroad in general and will not be discussed in more detail here.

Nevertheless, it is worth mentioning that various ECT contracting parties have adopted restrictions on the transfer of capital in the past, such as Iceland in 2008, Cyprus in 2013, and Greece in 2015. However, Iceland was not bound by the ECT at the moment of such application since it only ratified the ECT in 2015.[63] At the moment it seems that the Cypriotic and Greek measures did not give rise to any ECT disputes.

6.3. TRADE RELATED INVESTMENT MEASURES

On the basis of Art. 10(11) ECT, the application of a Trade Related Investment Measure (TRIM) as described in Art. 5 ECT can be considered as a breach of the host State under Part III of the ECT:

> "For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part."

This is important since, in the absence of this explicit provision, Art. 5 would be outside the scope of ECT tribunals whose jurisdiction is limited to breaches of Part III of the ECT and Art. 5 is located in Part II of the treaty.[64] Art. 5 provides

62. Abba Kolo & Thomas W. Wälde, 'Capital Transfer Restrictions under Modern Investment Treaties' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). P. 217. See, for example: Award, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, 2008. Paras. 237-245.
63. See: Energy Charter, 'Iceland Ratifies the Energy Charter Treaty' (Energy Charter 2015). <https://energycharter.org/media/news/article/iceland-ratifies-the-energy-charter-treaty/> accessed on 13/06/2019.
64. Article 26(1), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).

examples of TRIM's that are inconsistent with Arts. III (the NT obligation) and XI (general elimination of quantitative restrictions) of the GATT such as LCR's or trade balancing obligations.[65] The effect of Art. 10(11) is to 'translate the obligations created by these [GATT] provisions into obligations owed to, and enforceable by, Investors under the ECT' while the WTO Agreements can not be enforced by private persons.[66]

Prohibitions on TRIM's, or performance requirements as they are sometimes referred to, are absent in most BIT's.[67] According to some, these requirements are considered to be undesirable as they entail government interference with markets, which deters FDI, reduces economic efficiency, and distorts the market more generally.[68] However, according to others, such requirements are desirable as they ensure that the local economy benefits from foreign investment, which fosters the economic development of the host State.[69]

Regardless of the economic rationale of TRIM's, the major trade and investment agreements of the early 1990's such as, the ECT, the NAFTA, and the WTO Agreements all contain provisions that explicitly prohibit them.[70]

This section will briefly analyze TRIM's in IIA's and elaborate how TRIM's may be considered to be obstacles to trade and investment in RES and how they can be challenged through the ECT by investors. Since, to the best of the authors knowledge, there is currently no ECT case law which addresses Art. 10(11) ECT, this section is omitted.

65. Articles III & XI, General Agreement on Tariffs and Trade (adopted 30/10/1947, entered into force 01/01/1948).
66. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 132.
67. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 331.
68. Ibid. P. 330. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012). P. 90.
69. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 329.
70. See for example: Article 1106, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994). Article 2, Agreement on Trade-Related Investment Measures (adopted 15/04/1994, entered into force 01/01/1995).

6.3.1. Legal Comparison of IIA's

Since Art. 5 ECT explicitly refers to the GATT, the WTO Agreements are an important point of reference for a discussion of TRIM's under the ECT.

On the basis of Art. 2(1) of the WTO Agreement on Trade-Related Investment Measures (WTO TRIMS), no WTO Member may apply a TRIM that is inconsistent with the GATT 1994, including measures that are inconsistent with the NT principle of GATT Art. III. An illustrative list of TRIM's is annexed to the WTO TRIMS agreement and identifies various TRIM's, such as LCR's and trade balancing requirements as being inconsistent with Arts. III and XI GATT 1994. In that regard, the WTO TRIMS agreement does not create obligations beyond the GATT itself, but rather clarifies the compatibility of certain measures with the GATT.[71] The fact that the WTO TRIMS Agreement only clarifies the consistency of TRIM's in relation to the GATT means that its scope is limited on trade in goods and does not concern services.

The prohibition under Chapter 11 of the NAFTA is wider in scope in that regard, since it explicitly includes performance requirements that concern services:

> "Article 1106: Performance Requirements
>
> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of goods or services;
>
> (b) to achieve a given level or percentage of domestic content;

71. Report of the GATT Panel, *Canada – Administration of the Foreign Investment Review ACT,* (L/5504 - 30S/140), 7 February 1984. Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law: Text, Materials and Commentary* (Hart Publishing 2012). P. 671. William A. Fennell & Joseph W. Tyler, *The GATT Uruguay Round: A Negotiating History – Trade-Related Investment Measures* (Kluwer 1993). Pp. 73, 129-130. Michael Hahn, 'WTO Rules and Obligations Related to Investment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 657.

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market."

Also, it addresses the mandatory transfer of technology. Therefore, it clearly extends beyond measures that merely affect trade in goods. In addition, Art. 1107 NAFTA addresses national requirements concerning the senior management and board of directors of investments.

Under the ECT, Art. 5 prohibits TRIM's that are inconsistent with Arts. III and IX of the GATT. This means that it cannot extend to TRIM's related to services. This would be in line with the general trade provisions of the ECT, which merely deals with trade in goods. Interestingly, an early draft of the ECT did make reference to services in the context of TRIMs.[72]

Also, Art. 10(11) ECT makes clear that only TRIM's that are applied to an investment of an investor 'existing at the time of such application' shall be

72. Article 13(11), CONF 50, Draft Energy Charter Treaty (Basic Agreement) – Compromise text, 15 March 1993. <http://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/15_-_ECT_1__15.03.93__.pdf> accessed on 23/12/2016.

considered as a breach of the ECT.[73] Therefore, investors cannot enforce the TRIM's prohibition with regards to TRIM's that were enacted prior to the establishment of the investor in the host State.[74] During the ECT negotiations, the US tried to extend the scope of the TRIM's provision to the pre-establishment phase, including the possibility for investors to challenge these pre-establishment measures through ISDS.[75] The Australian delegation had a completely different view, arguing that TRIM's were a trade issue and not an investment issue.[76] Therefore, they opposed the possibility for investors to challenge TRIM's through ISDS and stated that these measures should be handled in the WTO context.[77]

The illustrative list of the WTO TRIMS Agreement which prescribes measures that are inconsistent with the GATT is reproduced in Art. 5(2) ECT.[78] Therefore, there is a very close link between the ECT and the GATT with regard to TRIM's.

It has to be noted that the GATT, the NAFTA, and the ECT all have exceptions with regard to TRIM's. For example, Art. 5(3) states that '[n]othing in paragraph (1) shall be construed to prevent a Contracting Party from applying the trade-related investment measures described in subparagraphs (2)(a) and (c) as a condition of eligibility for export promotion, foreign aid, government procurement or preferential tariff or quota programs.'[79]

6.3.2. Relevance for Renewable Energy Investors[80]

Performance requirements or TRIM's are quite common in the RES sector, especially in the form of LCR's. Quite a few States have incorporated LCR's in

73. Article 10(11), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
74. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 133-134.
75. Letter of the United States Department of State of 4 April 1994, Article 10, Binder 4/4, Doc. 607194 6/4/1994. Pp. 1-2.
76. Letter of the Australian Mission to the European Union of 2/9/1994, Article 10, Binder 4/4, Doc 12-9-1994/3514 and 12-9-1994/3508.
77. Id.
78. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 133-134.
79. See: Art. 1108 NAFTA, Arts. III(8)(a) & XI(2) GATT 1947.
80. This section draws from the following publications: Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1.

their renewable energy policies, especially as an eligibility criterion for a FIT.[81] On the basis of these LCR's, (the level of) government support is dependent upon the (level of) domestic content used in a project.[82] According to the OECD, the application of LCR's in the RES sector has increased since 2009 and they currently represent one of the most significant policy barriers to international trade and investment in the RES sector.[83] In fact, it has been said that LCR's 'have had a detrimental effect on global investment flows in solar and wind energy' since they disrupt the value chain of RES generation equipment that is increasingly globally organized.[84]

From an economic perspective, such LCR's can yield contradictory results and the exact method of application will determine the success of such requirements. On the one hand, States may argue that LCR's are rational: FIT's require 'the expenditure of a significant amount of public resources and a LCR' may lead to the creation of a local RES industry by virtue of which the local economy reaps the benefits of the policy.[85] Also, States may rely on the infant industry argument,

81. Jan-Christoph Kuntze & Tom Moerenhout, 'Local Content Requirements and the Renewable Energy Industry: A Good Match?' (*ICTSD,* 2013). Pp. 21-34 <http://unctad.org/meetings/en/Contribution/DITC_TED_13062013_Study_ICTSD.pdf> accessed on 04/07/2016. This study identified LCR's attached to FIT's in, amongst others: China, Canada, the United States, Brazil, South Africa, Turkey, India and several EU Member States. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and investment* (OECD Publishing 2015). Pp. 52-54. This study identified LCR's in the RES sector in, additionally to those named in the previous study: Argentina, Brazil, Jordan, Malaysia, Morocco, Russia, Saudi Arabia, Ukraine, and Uruguay.
82. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 185.
83. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and investment* (OECD Publishing 2015). P. 50. OECD, *OECD Business and Finance Outlook* (OECD Publishing 2016). Pp. 158-159.
84. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and investment* (OECD Publishing 2015). Pp. 59-60. OECD, *OECD Business and Finance Outlook* (OECD Publishing 2016). P. 159.
85. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 185. Jan-Christoph Kuntze & Tom Moerenhout, 'Are Feed-in Tariff Schemes with Local Content Requirements Consistent with WTO Law?' in Freya Baetens *et al* (eds.), *Frontiers of International Economic Law – Legal Tools to Confront Interdisciplinary Challenges* (Brill Nijhoff 2014). P. 152. Hartmut Kahl, 'Trade Law Constraints to Regional Renewable Energy Support Schemes' in Marjan Peeters *et al* (eds.), *Renewable Energy Law in the EU – Legal Perspectives on Bottom-Up Approaches* (Edward Elgar 2014). P. 45.

on the basis of which a LCR may lead to a more competitive renewable energy industry in the long term.[86]

On the other hand, LCR's, especially when poorly designed, may reduce the economic efficiency of a RES project since the investor would be compelled by the LCR to make use of inferior local content in its project.[87] As a consequence, less renewable energy will be produced at a price that is too high.[88] Also, LCR's may impose unnecessary transaction costs when foreign investors are forced to cooperate with unknown parties.[89] In addition, in particular when a country does not have a mature RES market, LCR's may lead to increased risks because of a lack of experienced players in the market with a solid track record which may increase the cost of capital.[90] Also, LCR's may expose investors to additional regulatory risks.[91] This is especially the case when the level of required local content may be changed unilaterally by the authorities which could change the status of existing facilities.[92]

Over the last view years LCR's in renewable energy policies have given rise to a significant number of international trade and, to a lesser extent, investment

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86. Id.
87. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186. Vladimir Tomsik & Jan Kubicek, 'Can Local Content Requirements in International Investment Agreements be Justified?' (*NCCR Trade Regulation,* 2006). P.15. <http://www.phase1.nccr-trade.org/images/stories/publications/IP11/wti%20wp%20 2006-20.pdf> accessed on 04/07/2016. An indication that a LCR is poorly designed is, for example, when the LCR is set too high, making it (nearly) impossible to meet. This has been named as a reason of why Russia's first round of auction for wind energy projects turned out to be a disappointment: Jürgen Heup, 'Russisch Roulette' [2014] 1 Neue Energie 78. P. 78-81.
88. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186. OECD, *OECD Business and Finance Outlook* (OECD Publishing 2016). P. 159.
89. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 31.
90. Id.
91. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186.
92. Anatole Boute, *Russian Electricity and Energy Investment Law* (Brill Nijhoff 2015). P. 527. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186.

disputes.[93] In the context of the WTO, various disputes involved LCR's in the RES sector.[94] This has so far resulted in several Reports of the WTO Appellate Body.[95] For example, the *Canada – Renewable Energy Cases* were initiated by Japan and the EU. The Ontario FIT program required 'wind and solar projects to source 50 and 60 percent of their project components locally in order to be eligible for a FIT' Contract.[96] The SOE in charge of implementation of the FIT program, which fell under the 'legislative responsibility of the Ministry of Energy', had to enter into FIT Contracts with eligible investors.[97] Investors that failed to meet the LCR's would default on their obligations under the FIT Contract.[98]

The WTO Panel had little difficulty with establishing that the LCR's violated Art. III(4) GATT and Art. 2(1) WTO TRIMS since the LCR's involved 'the 'purchase or use of' products from a domestic source,' and compliance with the LCR was also instrumental in order to obtain an advantage.[99] In the appeals procedure, the contested issue was not so much related to the question of whether or not the LCR was a violation of Art. III(4) GATT and Art. 2(1) WTO TRIMS, but rather whether Canada could successfully invoke the government procurement derogation of Art. III(8)(a) GATT, on the basis of which the NT obligation does not apply to laws and regulations governing government procurement.[100] The Appellate Body

93. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185.
94. Request for Consultations by the United States, *China – Measures Concerning Wind Power Equipment,* WT/DS419/1, 2011. Request for Consultations by China, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation* Sector, WT/DS452/1, 2012.
95. Reports of the Appellate Body, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/AB/R and WT/DS426/AB/R, 6 May 2013. Report of the Appellate Body, *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/AB/R, 2016.
96. Ontario Power Authority, 'Feed-in Tariff Program, FIT Rules Version 2.1' (December 2012) Para. 8.4(a). Jan-Christoph Kuntze & Tom Moerenhout, 'Are Feed-in Tariff Schemes with Local Content Requirements Consistent with WTO Law?' in Freya Baetens *et al* (eds.), *Frontiers of International Economic Law – Legal Tools to Confront Interdisciplinary Challenges* (Brill Nijhoff 2014). P. 154.
97. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 24 March 2016. Para. 355.
98. Ontario Power Authority, 'Feed-in Tariff Program, FIT Rules Version 2.1' (December 2012) Para. 8.4(b).
99. Reports of the Panel, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R and WT/DS426/R, 19 December 2012. Paras. 7.166 & 7.167.
100. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy

would reject this argument, however, on the basis that there was no competitive relationship – an essential requirement to successfully invoke the derogation of Art. III(8)(a) GATT – between the product that is being procured on the basis of the FIT Program and the product that is being discriminated.[101] Whereas the former relates to electricity, the latter concerns generation equipment of RES.[102] This conclusion has also been shared in academic literature.[103]

Hence, the LCR as an eligibility criterion of the Ontario FIT Program amounted to a violation of the WTO Agreements.

The facts in the WTO *India – Solar Module* case were comparable to the Canadian case. To receive a FIT, investors were obliged to manufacture and assemble PV cells and modules locally. Also, there was a requirement to source 30 percent of solar thermal projects locally.[104] In its Report, the WTO Panel established that the LCR's violated the NT obligation.[105] With regards to the government procurement derogation, the Panel simply followed the reasoning of the Appellate Body as set out in the *Canada – Renewable Energy Cases.*[106] On appeal, the Appellate Body confirmed that the Panel was properly guided by the Appellate Body Reports of the *Canada – Renewable Energy Cases*.[107] Therefore, like the Canadian measures, the LCR in the Indian RES scheme violated the NT obligation of Art. III GATT.

Law Review 185. Pp. 188-189.

101. Reports of the Appellate Body, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* and *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/AB/R and WT/DS426/AB/R, 6 May 2013. Para. 5.74.
102. Ibid. Paras. 5.76-5.79.
103. Jan-Christoph Kuntze & Tom Moerenhout, 'Are Feed-in Tariff Schemes with Local Content Requirements Consistent with WTO Law?' in Freya Baetens *et al* (eds.), *Frontiers of International Economic Law – Legal Tools to Confront Interdisciplinary Challenges* (Brill Nijhoff 2014). P. 158. Kati Kulovesi, 'International Trade Disputes on Renewable Energy: Testing Ground for the Mutual Supportiveness of WTO Law and Climate Change Law' [2014] 23 Review of European Community & International Environmental Law 342. P. 345. Marco Citelli, Marco Barassi & Ksenia Belykh, 'Renewable Energy in the International Arena: Legal Aspects and Cooperation' [2014] 2 Groningen Journal of International Law 1. P. 21.
104. Jan-Christoph Kuntze & Tom Moerenhout, 'Are Feed-in Tariff Schemes with Local Content Requirements Consistent with WTO Law?' in Freya Baetens *et al* (eds.), *Frontiers of International Economic Law – Legal Tools to Confront Interdisciplinary Challenges* (Brill Nijhoff 2014). P. 153.
105. Report of the Panel, *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/R, 2016. Paras. 7.95-7.99.
106. Ibid. Paras. 7.112-7.115, 7.120 & 7.126-7.135.
107. Report of the Appellate Body, *India – Certain Measures Relating to Solar Cells and Solar Modules,* WT/DS456/AB/R, 2016. Paras. 5.40-5.41.

In the NAFTA investment case *Mesa v. Canada*, the investor also complained about the LCR of the FIT Program of Ontario, this time on the basis of Art. 1106 NAFTA.[108] Contrary to the the WTO case, however, Canada would prevail in the LCR claim under Chapter 11 NAFTA. Despite the fact that the investor lost, the award is still of interest to RES investors both with regard to jurisdiction and the merits of the case.

Concerning jurisdiction, the *Mesa* tribunal determined that it had no jurisdiction over the LCR claim.[109] The tribunal was of the view that the LCR was enacted prior to Mesa's establishment in Canada as an investor and the tribunal only has jurisdiction with regard 'to measures that occurred after the Claimant became an "investor" holding an "investment."'[110] Since Mesa incorporated project vehicles in Canada after the LCR was already adopted, there was no 'investment' by Mesa at the time of adoption.[111]

Despite the fact that the tribunal lacked jurisdiction over the LCR claim, it explicitly stated that the claim would have failed on the merits anyway because the FIT Program is to be considered as 'government procurement' under Art. 1108 NAFTA, which excludes a claim under Art. 1106(1)(b) NAFTA.[112] This is noteworthy since the Appellate Body held that Canada could not invoke the government procurement derogation of Art. III(8)(a) GATT, which is formulated differently than the exception of Art. 1108 NAFTA.[113]

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108. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Para. 208.
109. Ibid. Para. 335.
110. Ibid. Para. 327.
111. Ibid. Para. 326. Award, *Vito G. Gallo v. The Government of Canada,* UNCITRAL, PCA Case No. 55798, 2011. Paras. 325-326. Award, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, 2009. Para. 68. Award, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, 2015. Para. 182.
112. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Para. 335.
113. Article III(8)(a) GATT reads: "The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale."
The relevant provisions of Article 1108 NAFTA state:
7. Articles 1102, 1103 and 1107 do not apply to:
(a) procurement by a Party or a state enterprise; or
(b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance.
8. The provisions of: […]
(b) Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a

According to the tribunal, the government procurement exception of NAFTA allows contracting parties to 'exercise nationality-based preferences in cases of procurement' in a way that allows a State 'to procure goods or services in a manner that yields maximum benefits for the local economy.'[114] Like the Appellate Body, the tribunal considered the FIT Program to be the procurement of electricity.[115] The tribunal did not, however, consider the importance of the differentiation between the product that is being discriminated (generation equipment) and the good that is being procured (electricity) to be relevant.[116] The tribunal held that Art. 1108 NAFTA is broader than Art. III(8)(a) GATT and that '[o]nce it is established that there has been "procurement" by a Party or state enterprise, Article 1108(7)(a) excludes all claims of NT, MFN and domestic content in connection with such procurement.'[117] As a consequence of this finding, it seems that under NAFTA the possibilities for investors to challenge LCR's attached to FIT's are limited due to the fact that a FIT Program is considered to be procurement of electricity which excludes a claim under Art. 1106 NAFTA.

It remains to be seen how a similar claim under the ECT would be resolved. Regarding jurisdiction an ECT tribunal might well follow the reasoning of the *Mesa* tribunal since there is nothing in the ECT which suggests that it would apply retroactively. Especially when one considers that the investment protection standards of the ECT merely apply post-establishment. In addition to this, Art. 10(11) ECT explicitly states that only TRIM's applied to an investment 'existing at the time of such application [of the TRIM]' shall be considered as a breach of an obligation under Part III of the ECT. This means that even if a tribunal would accept jurisdiction, the claim might still fail on the merits if the LCR was enacted prior to establishment because there was no investment of an investor at the time of application of the LCR.[118]

Regarding the government procurement exception of Art. 5 ECT, one could argue that the ECT exception should be interpreted in the light of Art. III(8)(a) GATT since Art. 5(1) ECT explicitly prohibits TRIM's that are inconsistent with the

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Party or a state enterprise;

114. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Paras. 419-420.
115. Ibid. Paras. 443-458.
116. Ibid. Para. 459.
117. Id.
118. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). Pp. 133-134.

GATT. The *Mesa* Tribunal refused to interpret Art. 1108 NAFTA in the light of the GATT exception since both provisions were phrased differently and the tribunal considered that if the NAFTA parties had wished to import the GATT exception they would have literally done so.[119] In an ECT case, the claimant can argue that the derogation of Art. III(8)(a) GATT is included by reference as well.

Despite the fact that investment treaties, such as the ECT and the NAFTA, may provide investors with the possibility to challenge LCR's attached to FIT Programs, the *Mesa* case highlights potential difficulties that need to be overcome, most importantly perhaps the one related to jurisdiction. It has been said that investments in the RES sector are primarily regulatory driven, which means that a State will primarily attract foreign RES investors *after* enacting a favorable renewable energy policy.[120] However, if this policy already contains LCR's, it will be very difficult for investors to challenge these measures because there might not be jurisdiction for a tribunal.[121] Also, Art. 10(11) ECT lays down that only TRIM's that are applied to existing investments can be considered as a breach of Part III of the ECT.[122] While a TRIM may nevertheless be in violation of Art. 5 ECT, this article is located in Part II of the ECT and ECT tribunals only have jurisdiction over alleged breaches of Part III of the ECT on the basis of Art. 26 ECT. One can consider this to be a significant shortcoming in the current legal framework that the ECT provides for.

Eventhough RES investors can challenge LCR's through the ECT, this should not diminish the role that WTO members play in contesting these measures through WTO dispute settlement.[123] Primarily because of the remedies that are available under WTO law. Under the WTO Agreements, the main sanction for violating the WTO Agreements is that the Respondent is obliged to bring its measures in line with the WTO Agreements, *i.e.* it should revoke the LCR.[124] This would, in theory, benefit all foreign RES investors.[125] In investment arbitration, the main remedy is

119. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Para. 433.
120. Petri Mäntysaari, *EU Electricity Trade Law – The Legal Tools of Electricity Producers in the Internal Electricity Market* (Springer 2015). P. 139.
121. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 192.
122. Ibid. P. 196.
123. Ibid. P. 197.
124. Id.
125. Id.

compensation although specific performance is not excluded under the ECT.[126] However, if a claimant would prevail in an ECT procedure and the tribunal awards monetary compensation this would only accrue benefits for that specific claimant without reducing barriers to investment for other foreign RES investors.[127]

6.4. KEY PERSONNEL

On the basis of Art. 11(1) ECT a contracting party has to 'examine in good faith requests' by investors or key personnel employed by investors or investments of such investors, 'to enter and remain temporarily' within its jurisdiction, subject to its domestic law. Furthermore, Art. 11(2) ECT touches upon the investors rights to employ key personnel regardless of nationality and citizenship. These provisions address an important issue for both investors and host State's. From the investors perspective, it may be desirable that its key personnel can enter the country where it invested in order to make the investment a success.[128] Likewise, hiring qualified personnel is also a main concern to the investor. From the State's perspective, it may be desirable to regulate the entry of aliens into the country in the pursuit of national security, immigration, and labor policies.[129] Nevertheless, one of the perceived benefits of FDI for a host State is the acquisition of foreign technology, skills, and know how, which requires foreign personnel and experts to enter the country.[130]

6.4.1. Legal Comparison of IIA's

According to Salacuse, most IIA's 'do not contain provisions dealing with the entry and sojourn of foreign nationals associated with an investment.'[131] In the absence of a treaty provision dealing with key personnel, the domestic law of the host State will exclusively regulate this issue.[132]

126. Article 26(8) ECT. See also: Berk Demirkol, 'Remedies in Investment Treaty Arbitration' [2015] 6 Journal of International Dispute Settlement 403.
127. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes – Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 197.
128. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 333.
129. Id.
130. Id.
131. Id.
132. Ibid. P. 334.

Even when an IIA contains a key personnel provision, it is often drafted in non-normative language.[133] As becomes clear from Art. 11(1) ECT for example, there is merely an obligation 'to examine in good faith' requests of investors regarding the entrance of personnel. On the basis of Art. 11(2), investors are permitted to employ personnel regardless of nationality 'provided that such key person has been permitted to enter, stay, and work' in the host State. Salacuse interprets this provision as overriding 'local legislation' which limits 'the ability of foreign nationals to work in certain jobs or that gives nationals of the host country employment priority.'[134] Personally, I would interpret this provision differently, with only extending rights to the investor once the host State has allowed foreigners to enter the country. In the absence of this approval, Art. 11(2) ECT is of little benefit for the investor.

Non-normative language can also be found in other IIA's. The German Model BIT for example, only requires States to 'give sympathetic considerations to applications for the entry and sojourn of persons of either Contracting State who wish to enter the territory' of the other contracting party.[135] These sympathetic considerations shall be given 'within the framework' of the national legislation of that same State.[136]

The NAFTA's provision regarding personnel is limited to senior management and the board of directors.[137] In relation to the former, NAFTA contracting parties may not impose nationality requirements, while in relation to the latter this is allowed 'provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.'[138] Similar provisions can be found in the Model BIT's of the US and Canada as well as the CPTPP.[139] The CETA deviates slightly by prohibiting nationality requirements in relation to the appointment of both senior management and the board of directors.[140]

133. Id.
134. Id.
135. Article 3(6), Germany Model BIT, 2008.
136. Id.
137. Article 1107, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994).
138. Id.
139. Article 9, US Model BIT, 2012. Article 6, Canada Model BIT, 2004. Article 9.11, Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018).
140. Article 8.8, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).

6.4.2. ECT Arbitral Practice

Key personnel provisions are not often invoked in ISDS cases and, to the best of the present author knowledge, it has only been relied upon in one ECT dispute.[141]

In the *Anatolie Stati v. Kazakhstan* case, the investors relied on the provision. The dispute concerned attempts by the Kazakh authorities to force the investors to hand over substantial investments in oil and gas fields to a SOE just when the project, in which the claimants allegedly invested more than USD 1 bln, began to generate returns.[142] In order to apply pressure to the investors, Kazakh authorities started 'a targeted campaign of intimidation and harassment' which included the imprisonment of an employee on 'bogus criminal charges' and threats to other employees that they would be accorded the same treatment.[143] When the investors refused to comply with the demands of the authorities, 'the government simply seized the investments.'[144] The claimants argued that the imprisonment of personnel on false charges and the threats to other employees, which forced these people to flee Kazakhstan, were in violation of Art. 11 ECT.[145]

The tribunal would not rule on this argument, however, since it had already established that the actions of the respondent amounted to a breach of the ECT's FET standard, which precluded the need to examine any other grounds put forward by the claimants if these could not lead to further damages.[146] The only example where a claimant put forward a claim on the basis of Art. 11 ECT is thus one involving rather extreme circumstances.

6.4.3. Relevance for Renewable Energy Investors

Despite the fact that there is little arbitral practice under the ECT and other IIA's regarding key personnel provisions, this does not mean that it may not be a relevant provision for RES investors. The provision might, however, be more concerned with the promotion of investment rather than the protection thereof.

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141. For a domestic court case relating to a key personnel provision found in a US-Japan treaty, see: Judgment, *Sumitomo Shoji America, Inc. v. Avagliano,* US Supreme Court, 457 U.S. 176 (1982). Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 335.
142. Award, *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V (116/2010), 2013. Para. 2.
143. Id.
144. Id.
145. Ibid. Para. 1317.
146. Ibid. Para. 1324.

Although the RES industry is moving from an early stage of development into maturity, the level of knowledge and expertise regarding RES can vary greatly from country to country.[147] The States that were amongst the early adopters of RES, primarily developed countries, have an established RES industry and skilled workforce in this regard. However, those countries that do not have a developed RES industry and workforce can run into practical problems when trying to stimulate the generation of RES, especially when a country suddenly experiences a rapid increase in RES investments.[148] A lack of a skilled and qualified workforce can lead to a situation where the full potential of RES is not realized in a country because of a lack of capacity of the industry or because inferior planning, construction, and maintenance of RES facilities undermines the efficiency of such installations. According to the International Labour Organization and the EU, this does not only hold true with regard to the technical aspect of RES projects, but also in relation to non-technical professions, such as 'sales specialists, inspectors, auditors, lawyers, and those working in investment finance.'[149]

When foreign RES investors are allowed to make use of their own personnel in all stages of the development of a RES project, this problem can (partially) be overcome by filling a gap in the host State with employees from abroad.[150] For the host State, allowing foreign engineers to engage in RES projects provides opportunities for technology transfer.[151] However, under the current legal framework that the ECT provides for, the host State has a wide discretion when deciding whether or not to allow such foreign personnel to enter the country.

It has been said that RES 'production is as much based upon services as upon hardware.'[152] This especially holds true for those services that can take place in Mode 4 (movement of natural persons), such as scoping, engineering,

147. Research Brief, 'Investment in Renewable Energy Generates jobs - Supply of Skilled Workforce Needs to Catch Up' (*International Labour Organization & European Union*, 2011). <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_168354.pdf> accessed on 18/01/2017. P. 6-7.
148. Id.
149. Ibid. P. 7.
150. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 36.
151. Ibid. Pp. 36-37.
152. Thomas Cottier, 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?' [2014] 5 Renewable Energy Law & Policy 40. P. 45.

construction, and maintenance.[153] A properly drafted provision on the entrance of key personnel can function as a bridge between obligations regarding the international trade in services, that are not enforceable by private investors, and obligations under IIA's, that are enforceable by private investors through ISDS. Therefore, while there is very little arbitral practice regarding Art. 11 ECT, a properly drafted clause about key personnel may nonetheless significantly reduce barriers to RES investments.

In this regard, inspiration can perhaps be drawn from the articles on 'key personnel' and 'contractual service suppliers and independent professionals' of CETA Chapter 10.[154] These provisions contain much more normative language thereby containing commitments well beyond best endeavours obligations. However, these provisions can be found in the chapter on 'temporary entry and stay of natural persons for business purposes' and not in the investment chapter. Therefore, they were most likely negotiated in the context of trade in services under Mode 4, which emphasises the interrelatedness of investment and trade in services.

6.5. Conclusion

After this review of the provisions of the ECT's investment chapter that concern investment promotion, the fourth sub-question can now (partially) be answered. This question reads in full:

> 'What does the current legal framework of the ECT concerning investment promotion and protection provide for?'

Since this chapter merely dealth with the ECT's legal framework concerning investment promotion, I will only answer the sub-question with regards to investment promotion.

In the previous chapter it was argued that the ECT provides for a high level of investment protection but that these investment protection standards are not necessarily of significant influence on increased flows of FDI between contracting parties in the absence of investment promotion commitments. However, after having analyzed the investment promotion provisions, it becomes clear that

153. Id.
154. Article 10.7 & 10.8, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).

the ECT's emphasis is on post-establishment investment protection rather than investment promotion and liberalization. Some of the commitments undertaken by ECT contracting parties are rather hortatory in nature – *i.e.* being of best endeavours as is the case of investment liberalization – or they may completely subject a topic to national law, as is the case for the ability of key personnel to move cross-border. Even if the treaty may contain a potentially important provision, such as the one related to TRIMs, it may in practice be of little use to investors due to the way in which it is drafted. All in all, this means that foreign investors may be confronted with all sorts of pre-establishment investment barriers, such as domestic equity participation requirements or LCR's. This may undermine the ability of foreign investors to enter new markets without having to overcome significant barriers. In turn, this means that the ECT may currently not be very well equipped to effectively facilitate RES investments.

CHAPTER 7.

Carve-out and Exceptions

7. CARVE-OUT AND EXCEPTIONS

The previous chapters discussed the substantive provisions of Part III of the treaty. In this chapter, several exceptions will be discussed. Although these are not located in Part III of the ECT, they can potentially affect the application of norms laid down in Part III.

Carve outs and exceptions are often included in IIA's in order to balance the investors' rights, as created through the investment protection standards, with the States' right to regulate its domestic affairs.[1] Exceptions may be used to justify measures that would otherwise be wrongful because they would, in the absence of the exception, violate the IIA while a carve out places a particular issue outside a tribunals' jurisdiction.[2] As such, they can have a significant impact on the application of the treaty.

In this chapter the taxation exception of Art. 21 will be discussed followed by an examination of the general exceptions of Art. 24 ECT.

7.1. TAXATION

Due to the existence of Art. 21 ECT, taxation measures are 'largely outside the scope of the protections accorded' for by the ECT.[3] Given the fact that taxation measures, especially when applied disproportionately, can have a very significant impact on the economic viability of an investment, the carve out can have significant effects for investors that seek protection under the ECT.

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1. Gloria Alvarez, 'Article 21 – Taxation' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 290. Arno Gildemeister, 'Investment Law and Taxation' in Marc Bungenberg *et al* (eds.), *International Investment Law – A Handbook* (C.H. Beck 2015). P. 1678. Andrew Newcombe, 'The Americas' in Marc Bungenberg *et al* (eds.), *International Investment Law – A Handbook* (C.H. Beck 2015). Pp. 214-215. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Para. 191.
2. Constantino Grasso, 'Article 24 – Exceptions' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 322. Gloria Alvarez, 'Article 24 – Exceptions' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). Pp. 327-329.
3. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 186.

It has been said that Art. 21 ECT is 'a provision of Byzantine complexity.'[4] Nevertheless, it will be discussed here since it can have a direct influence in ECT cases – as is evidenced by numerous awards in RES disputes. In fact, it has been said that the ECT's taxation carve out is the reason that in some RES-cases, claimants did not even invoke the ECT but relied on another applicable IIA instead.[5]

7.1.1. Legal Comparison of IIA's

Before comparing the Art. 21 ECT to other tax carve outs in IIA's, the provision itself will be briefly explained.

The first paragraph of Art. 21 ECT provides that:

> "Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency."

On the basis of this provision, taxation measures are exclusively governed by Art. 21 and, unless Art. 21 specifies to the contrary, provisions of Part III of the ECT regarding investment protection do not apply.[6]

A definition 'taxation measures' can be found in Art. 21(7)(a), which reads the following:

> "(i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
>
> (ii) any provision relating to taxes of any convention for the avoidance or double taxation or of any other international agreement or arrangement by which the Contracting Party is bound."

4. Id. See also: Gloria Alvarez, 'Article 21 – Taxation' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). Pp. 297-298.
5. Joe Tirado, 'Renewable Energy Claims under the Energy Charter Treaty: An Overview' [2015] 12 Transnational Dispute Management 1. P. 21.
6. Thomas Roe & Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011). P. 187.

According to Roe and Happold, the fact that Art. 21(7)(a) ECT refers to national law is unfortunate since it potentially provides ECT contracting parties with a loophole in the ECT which might be 'open to abuse.'[7]

Despite the fact that taxation measures are exclusively governed by Art. 21, the provision touches upon three investment protection standards found in Part III of the ECT.

On the basis of Art. 21(3) ECT, the NT and MFN obligations of Arts. 10(2) and (7) ECT do apply to taxation measures, with the exception of taxation measures on income and capital. It has been said that the exclusion of these specific taxation measures can be explained 'by the fact that double taxation agreements usually cover taxes on income and capital, so the intention was to avoid conflict between the provisions of such agreements and Articles 10(2) and (7) of the ECT.'[8]

Other limitations of the applicability of the NT and MFN obligations in relation to taxation measures can be found in Arts. 21(3)(a) and (b), which provide for the following:

> "(a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organization; or
>
> (b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty."

Expropriation is also addressed in Art. 21 ECT. This one is quite important since Art. 21(5)(a) essentially contains a 'claw back' provision in relation to expropriation by stating that 'Article 13 shall apply to taxes.'[9] However, Art. 21(5)(b) lays down a procedure that has to be followed in expropriation cases

7. Id.
8. Ibid. P. 189.
9. Arno Gildemeister, 'Investment Law and Taxation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 1685.

involving taxation measures. According to Roe and Happold, 'what paragraph 5(a) gives substantively, paragraph 5(b) takes away procedurally.'[10] In essence, expropriation claims will have to be referred to a 'competent tax authority' that will have to review 'whether the tax is an expropriation or whether the tax is discriminatory.'[11] In the case that neither the investor nor the respondent State makes such a referral, 'bodies called upon to settle dispute pursuant to' Art. 26 or 27 ECT will have make such a referral.[12] According to Art. 21(7)(c) ECT a competent tax authority' is defined as 'the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives.' Hence, when an investor argues that taxation measures expropriated its investment, the national tax authority may become involved in the dispute. However, the tribunal 'may take into account any conclusions arrived at by the Competent Tax Authority regarding whether the tax is an expropriation.'[13] These conclusions are therefore not binding upon the tribunal. Kolo has described the ECT's compromise between expropriation and taxation as protecting '*bona fide* host state taxing power while also safe guarding *bona fide* claims by foreign investors.'[14]

The third provision of Part III of the ECT that is addressed in Art. 21 relates to Art. 14 about the transfer of funds. As clarified by Art. 21(6) ECT, '[f]or the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.' According to Wälde and Kolo, 'the phrase 'or by other means' leaves the door wide open for a host state to decide on the type of taxes to impose on capital transfers.'[15]

The ECT is most definitely not the only IIA with a taxation carve out, although the exact content of such carve outs can differ considerably.[16] A study by Davie

10. Ibid. P. 191.
11. Article 21(5)(b)(i), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
12. Id.
13. Ibid. Article 21(5)(b)(ii).
14. Abba Kolo, 'Tax "Veto" as a Special Jurisdictional and Substantive Issue In Investor-State Arbitration: Need for Reassessment?' [2009] 32 Suffolk Transnational Law Review 475. P. 492.
15. Thomas W. Wälde & Abba Kolo, 'Coverage of Taxation under Modern Investment Treaties' in Peter Muchlinski *et al* (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008). P. 334.
16. Matthew Davie, 'Taxation-Based Investment Treaty Claims' [2015] 6 Journal of International Dispute Settlement 202. P. 210.

shows that most taxation carve outs in IIA's exclude the MFN obligation with regards to double taxation treaties.[17] According to the UNCTAD, these MFN exceptions for double taxation treaties allow States to give tax benefits to investors from one country without the obligation to extend such preferential treatment, which is often the result of a bilateral negotiation process where concessions might have been obtained in return, to investors of third States.[18]

The differences of the scope of tax carve outs in IIA's are quite significant. They range from a complete exclusion of taxation measures from the scope of the treaty on the one hand.[19] To IIA's where taxation measures can infringe all investment protection standards, perhaps with the sole exception of the MFN obligation to double taxation treaties, on the other hand.[20] Davie has said about IIA's based on the Netherlands Model BIT, for instance, that 'they are probably the IIA's which are most conducive to taxation based investment claims.'[21] Treaties like the ECT and NAFTA are somewhere in between these approaches: there are exceptions with regards to NT and MFN, FET is completely excluded in relation to taxation, but taxation measures that amount to expropriation may still violate the IIA subject to certain conditions.[22]

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17. Ibid. P. 216-217. Arno Gildemeister, 'Investment Law and Taxation' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 1682.
18. UNCTAD, *Taxation* (United Nations 2000). Pp. 33-36. Thomas W. Wälde & Abba Kolo, 'Coverage of Taxation under Modern Investment Treaties' in Peter Muchlinski *et al* (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008). Pp. 325-326.
19. Matthew Davie, 'Taxation-Based Investment Treaty Claims' [2015] 6 Journal of International Dispute Settlement 202. P. 217. Article 11(3), Agreement Between the Government of the Kingdom of Denmark and the Government of the Russian Federation Concerning the Promotion and Reciprocal Protection of Investments (Denmark-Russia) (adopted 04/11/1993, entered into force 26/08/1996). Article 2(4), Colombia Model BIT, 2008.
20. Matthew Davie, 'Taxation-Based Investment Treaty Claims' [2015] 6 Journal of International Dispute Settlement 202. P. 217.
21. Id. See for example: Decision on Jurisdiction and the Merits, *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, 2013. Paras. 313-315.
22. Id. Article 2103, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994). Abba Kolo, 'Tax "Veto" as a Special Jurisdictional and Substantive Issue In Investor-State Arbitration: Need for Reassessment?' [2009] 32 Suffolk Transnational Law Review 475. P. 478. Arno Gildemeister, 'Investment Law and Taxation' in Marc Bungenberg *et al* (eds.), *International Investment Law – A Handbook* (C.H. Beck 2015). P. 1683.

7.1.2. ECT Arbitral Practice

Various ECT tribunals have touched upon Art. 21 ECT, including many tribunals in RES disputes. Some of these tribunals primarily repeated the words and scope of Art. 21.[23]

Perhaps the most remarkable interpretation of Art. 21 ECT was provided by the *Yukos* tribunal, which somewhat deviated from the text of the provision. In these cases, the Russian authorities had imposed massive tax bills upon the investors and the question that the tribunal had to answer was whether the investment protection standards still applied given the tax exclusion of Art. 21. The tribunal would eventually conclude that it had jurisdiction over expropriation claims, as well as over claims under Art. 10 ECT since the taxation measures at hand were not *bona fide* taxation measures.[24] The tribunal put forward two arguments in favor of this. Firstly, it held that despite the taxation carve out of Art. 21(1) ECT, it still had jurisdiction over expropriation claims due to the 'claw back' provision of Art. 21(5) ECT.[25] Secondly, the tribunal also came to the conclusion that the entire carve out of Art. 21 ECT did not apply in the case since it only applies to cases where a host State was exercising its *bona fide* tax powers.[26] In the *Yukos* cases, the conduct of the Russian authorities was not an exercise of *bona fide* tax powers, but rather an exercise intended 'to bankrupt Yukos and appropriate its valuable assets.'[27]

Most ECT tribunals in Spanish RES cases also addressed Art. 21 ECT because investors complained, amongst others, about a 7 percent taxation measure imposed on generators of electrical energy.[28] Tribunals have, however, held consistently that they lack jurisdiction over this measure due to Art. 21 ECT.[29] In

23. Award, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, 2008. Para. 266.
24. Final Award, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, 2014. Paras. 1405-1407. Final Award, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2014. Paras. 1405-1407. Final Award, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, 2014. Paras. 1405-1407.
25. Ibid. Paras. 1409-1429.
26. Ibid. Paras. 1430-1446.
27. Ibid. Para. 756.
28. Article 8, Law 15/2012, Boletin Oficial del Estado, nr. 312, 2012. P. 88081. Joe Tirado, 'Renewable Energy Claims under the Energy Charter Treaty: An Overview' [2015] 12 Transnational Dispute Management 1. P. 7.
29. Decision on Jurisdiction, Liability and Partial Decision on Quantum, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, 2019. Paras. 221-233. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v.*

Eiser v. Spain, the tribunal refused to explicitly endorse the position of the *Yukos* tribunal that Art. 21 only applies in cases of *bona fide* taxation measures – it simply held that it did not need to rule on this aspect since the tribunal held that the 'power to tax is a core sovereign power that should not be questioned lightly.'[30] The analysis of the *Eiser* tribunal was received with approval in the *Masdar v. Spain* and *9REN Holding v. Spain* cases.[31] The *Antin v. Spain* tribunal contrasted the facts in the case at hand with the extreme circumstances of the *Yukos* case.[32] In *Isolux v. Spain* and *Cube Infrastructure v. Spain*, the tribunals shared the view of the *Yukos* tribunal concerning the *bona fide* requirement, although they still declined jurisdiction because the 7 percent tax was viewed as a taxation measure that was adopted in good faith.[33]

In some Italian RES cases, investors also complain about taxation measures.[34] In 2008, a so-called 'Robin Hood tax' was adopted, that was supposed to address windfall profits made by energy companies.[35] When the revenues of

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Kingdom of Spain, ICSID Case No. ARB/13/36, 2017. Para. 272. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, 2018. Para. 295. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 323. Final Award, *Foresight Luxembourg Solar 1 S. Á.R.L., Foresight Luxembourg Solar 2 S.Á.R.L., Greentech Energy System A/S, GWM Renewable Energy I S.P.A and GWM Renewable Energy II S.P.A v. Kingdom of Spain* (SCC Case No. 2015/150), 2018. Para. 247. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Paras. 185-191. Award, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, 2019. Para. 207. Decision on Jurisdiction, Liability and Quantum Principles, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, 2019. Paras. 372-373.

30. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 270.
31. Award, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, 2018. Para. 294. Award, *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, 2019. Para. 207.
32. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 322.
33. Final Award, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, 2016. Paras. 733-741. Decision on Jurisdiction, Liability and Partial Decision on Quantum, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, 2019. Para. 225.
34. Saverio Massari, 'The Italian Photovoltaics Sector in Two Practical Cases: How to Create an Unfavorable Investment Climate in Renewables' [2015] 12 Transnational Dispute Management 1. P. 9.
35. Final Award, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, 2018. Paras. 162-166.

the investor exceeded a certain threshold the tax measure was applied. Although RES investors, including PV, biomass and wind energy, were initially excluded from the scope of the measure, this changed in 2011.[36] In *Greentech v. Italy*, the tribunal nevertheless refused to accept jurisdiction over such a measure as did the tribunal in *CEF Energia v. Italy*.[37]

Likewise, investors in the Czech PV sector were also confronted with several taxation measures, including a so-called 'Solar Levy'.[38] This levy applied in relation to both FIT's (26 percent) and green bonuses (28 percent). The tax 'was withheld by the grid operator who paid the FIT' or green bonuses to the RES generators that produced electricity.[39] The Solar Levy was extended two years after its introduction, although the tax rate was reduced and in effect, this measure reduced revenues for RES investors.[40] In the Czech Republic a tax exemption for RES producers under the Income Tax Act was also withdrawn, although only with prospective effects.[41] In the *Antaris v. Czech Republic* case, the tribunal held that the application of Art. 21 depended on a two-step analysis: 'a characterization under domestic law followed by an application of Article 21's inherent limits.'[42] What makes the Czech taxation measures more complicated is that different views exist with regards to the qualification of the Solar Levy as a taxation measure under Czech law.[43] In line with the highest domestic courts, the *Antaris* tribunal held that the 'Solar Levy', although labelled a levy, was not a taxation measure since, in substance, it reduced the FIT for a very specific group of investors rather than raising revenues for the State by being imposed

36. Id.
37. Ibid. Para. 175. Award, *CEF Energia B.V. v. Italian Republic*, SCC Case No. 158/2015, 2019. Paras. 204-205.
38. Anna de Luca, 'Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom' [2015] 12 Transnational Dispute Management 1. Pp. 3-4. Joe Tirado, 'Renewable Energy Claims under the Energy Charter Treaty: An Overview' [2015] 12 Transnational Dispute Management 1. P. 8. Award, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, 2018. Paras. 96-100.
39. Award, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, 2018. Paras. 96-100.
40. Ibid. Para. 102. See also: Final Award, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, 2017. Paras. 48-52.
41. Award, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, 2018. Para. 100.
42. Ibid. Para. 224.
43. Ibid. Paras. 225-243.

across the board.[44] Hence, the tribunal concluded that the Solar Levy did not fall within the scope of Art. 21.[45]

The same test was applied by the arbitral tribunal in the *PV Investors v. Czech Republic* cases in relation to the same Solar Levy.[46] The tribunal first ascertained the domestic law nature of the alleged taxation measure followed by an examination of whether the measures fell within the 'inherent limits' of Art. 21 ECT.[47] Importantly, the tribunal held that Art. 21 'was not intended to exclude from the ECT's scope measures the main objective of which was other than that of the raising of general revenue for the State,and which were formulated and structured as taxation measures for a particular ulterior reason (such as, here, reducing the risk of legal challenges).'[48] Since the tribunal found that the Solar Levy was not a taxation measure under Czech law and was adopted – not with the primary purpose of raising revenue for the State – but rather to reduce the FIT for specific investors, the tribunal found that the Solar Levy did not fall under the scope of Art. 21 ECT.

7.1.3. Relevance for Renewable Energy Investors

As already becomes clear from the discussion of ECT case law, RES investors in various countries have been confronted with a wide variety of taxation measures which makes Art. 21 ECT highly relevant for RES investors.[49] In fact, the presence

44. Ibid. Paras. 243 & 252.
45. Ibid. Para. 252.
46. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019.
47. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Paras. 296-311. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Paras. 237-252. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Paras. 248-263. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Paras. 315-330.
48. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 313. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 254. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 265. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 332. Footnote omitted.
49. Anna de Luca, 'Renewable Energy in the EU, the Energy Charter Treaty, and Italy's Withdrawal Therefrom' [2015] 12 Transnational Dispute Management 1. Pp. 3-4. Joe Tirado, 'Renewable Energy Claims under the Energy Charter Treaty: An Overview' [2015] 12 Transnational Dispute Management 1. P. 21. Saverio Massari, 'The Italian Photovoltaics Sector in Two Practical Cases: How to Create an Unfavorable Investment Climate in Renewables' [2015] 12 Transnational Dispute Management 1. P. 9.

of Art. 21 ECT has been named as a reason that in the *JSW Solar v. Czech Republic* case, the German investors merely invoked the Germany-Czech Republic BIT because it does not contain a provision comparable to Art. 21 ECT.[50]

From the cases above, several things can be concluded. Firstly, it is important – though not dispositive – that the taxation measure qualified as such under the domestic law of the respondent. Secondly, if the measure qualifies as a taxation measure and it is applied *bona fide*, the investor faces an uphill battle to establish that Art. 21 does not apply. Thirdly, and particularly the *Yukos, Antaris,* and the *PV Investors v. Czech Republic* cases pay testimony to this, measures adopted under the header 'taxation', but which aim to achieve a very different goal than raising general revenue for the State may not qualify for exemption under the Art. 21 carve out.

As held by the *Yukos* tribunals:

> "Article 21 of the ECT can apply only to *bona fide* taxation actions, *i.e.*, actions that are motivated for the purpose of raising general revenue for the State. By contrast, actions that are taken only "under the guise" of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent) […] cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1)."[51]

More specifically in the context of reducing FIT's, the *Antaris* tribuneld held:

> "[…] the Tribunal concludes that the Solar Levy does not fall within the scope of Article 21 of the ECT. In this regard are of particular importance statements made in connection with the enactment of

50. Final Award, *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, 2017. Para. 68. Joe Tirado, 'Renewable Energy Claims under the Energy Charter Treaty: An Overview' [2015] 12 Transnational Dispute Management 1. P. 20.
51. Final Award, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, 2014. Paras. Para. 1431. Final Award, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, 2014. Para. 1431. Final Award, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, 2014. Para. 1431.

> the Solar Levy […] These statements clearly show that the Solar Levy's principal objective was a reduction in the level of the FiTs payable to certain solar investors, and not the raising of revenue; they also show that the Solar Levy was structured, in many respects, as a tax in order to reduce the risk of claims against the Czech Republic under international law."[52]

When comparing the taxation measures in the Czech cases *vis-à-vis* those in Italy and Spain, of particular relevance is whether the measure are imposed to a specific group of investors alone, such as PV investors in the Czech Republic, or whether the measures are applied across the board in the electricity sector, as was the case in Spain, or even to a broader category, namely the entire energy sector as was the case in Italy. This means that if a measure targets exclusively RES investors with the purpose of reducing financial support, ECT arbitral practice demonstrates that Art. 21 ECT does not necessarily apply.[53]

7.2. GENERAL EXCEPTIONS

The final provision of the ECT that will be examined in this chapter is Art. 24, which contains the general exceptions of the ECT. Like Art. 21, it is not a provision that investors can invoke, but rather one on which States can rely to argue that certain investment provisions do not apply to a particular case.

Contrary to Art 21 ECT, which contains a specific tax carve out, the exceptions of Art. 24 are of a more general nature and are more comparable with the exceptions of the WTO Agreements, as laid down in Arts. XX and XXI GATT and Arts. XIV and XIV *bis* of the GATS.

Despite the fact that Art. 24 ECT has never been invoked in practice, which also explains why the section on ECT arbitral practice is omitted, and several leading textbooks do not even touch upon this issue, the provision may have an impact in practice. Hence, it will be briefly discussed.

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52. Award, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, 2018. Para. 252.
53. Award, *I.C.W. Europe Investments Limited v. The Czech Republic*, PCA Case No. 2014-22, 2019. Para. 321. Award, *Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*, PCA Case No. 2014-21, 2019. Para. 262. Award, *Voltaic Network GmbH v. Czech Republic*, PCA Case No. 2014-20, 2019. Para. 273. Award, *WA Investments-Europa Nova Limited v. The Czech Republic*, PCA Case No. 2014-19, 2019. Para. 340.

7.2.1. Legal Comparison of IIA's

Essentially, the exceptions of Art. 24 can be divided into three categories: the general exceptions, the essential security exception, and the exception to extend MFN treatment as a result of membership to a free trade area or customs union. These will be addressed in turn. As a preliminary remark, it is important to note that Art. 24(1) makes clear that the exceptions of Art. 24 do not apply to Arts. 12 and 13 of the ECT, thereby excluding the applicability of the exceptions to the compensation for losses and expropriation provisions.

The general exceptions clause of the ECT can be found in Art. 24(2). Essentially, this provision allows contracting parties to adopt measures (1) necessary to protect human, animal or plant life or health, (2) in emergency energy shortage situations, and (3) to benefit indigenous, economically or socially disadvantaged investors. With regards to the third category, Art. 24(2)(iii)(b) makes clear that '[s]uch measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than strictly necessary to the stated end.' Noteworthy is, however, that the exception related to protect human, animal or plant life or health does not apply – in a rather complicated manner – to Part III of the treaty as a whole.[54] This means that measures adopted in the pursuit of said objectives have to comply with all the investment protection standards of the ECT. This clearly illustrates that envinromental considerations, although taken into account during the ECT negotiations, are clearly second to economic considerations related to investment.[55]

The essential security exception is contained in Art. 24(3) ECT and states that nothing in the ECT shall be 'construed to prevent any Contracting Party from taking any measure which it considers necessary' to protect its essential security interests or for the maintenance of public order.[56] Although this exception can

54. Cees Verburg, 'The Energy Charter Treaty' in Martha Roggenkamp *et al* (eds.), *Energy Law and the Environment* (Edward Elgar, forthcoming 2020). P. 7.
55. See: Clare Shine, 'Environmental Protection under the Energy Charter Treaty' in Thomas Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade* (Kluwer Law International 1996). Thomas Wälde & Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' [2001] 51 International and Comparative Law Quarterly 811. Antonia Layard, 'The European Energy Charter Treaty: Tipping the Balance between Energy and the Environment' [1995] 4 European Energy and Environmental Law Review 150.
56. Article 24(3) ECT reads as follows:
The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers

be found in IIA's more often, the phrasing of such provisions differs from treaty to treaty.[57]

An important issue in relation to these exceptions is the question of whether or not the provision is self-judging in nature.[58] The ECT, for example, clearly states that contracting parties may adopt measures 'which it considers necessary' to protect the security interests and the public order within its jurisdiction. In that regard, the ECT adopts the same approach as Art. XXI GATT.[59] According to Salacuse, this 'gives rise to the inference that the exception clause is self-judging.'[60] In other IIA's, such as the Argentina-US BIT, the exception does not include the phrase 'which it considers necessary', which would imply that the clause is not self-judging.[61] In the *Nicaragua* case, the ICJ touched upon this difference when comparing the security clause of GATT to the one found in the applicable treaty, the 1956 US-Nicaragua Treaty of Friendship, Commerce and Navigation which does not contain the 'which it considers necessary' qualification:

> "[…] the text of Article XXI of the [US-Nicaragua] Treaty does not employ the wording which was already to be found in Article XXI

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necessary:
(a) for the protection of its essential security interests including those
(i) relating to the supply of Energy Materials and Products to a military establishment; or
(ii) taken in time of war, armed conflict or other emergency in international relations;
(b) relating to the implementation of national policies respecting the nonproliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or
(c) for the maintenance of public order.
Such measure shall not constitute a disguised restriction on Transit

57. UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations 2007). Pp. 83-87.
58. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 344-345. Céline Lévesque & Andrew Newcombe, 'The Evolution of IIA Practice in Canada and the United States' in Armand de Mestral *et al* (eds.), *Improving International Investment Agreements* (Routledge 2013). P. 37. Gloria Alvarez, 'Article 24 – Exceptions' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 328.
59. For legal practice under Art. XXI GATT, see: Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013). Pp. 594-600.
60. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). Pp. 344-345.
61. Article XI, Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (United States-Argentina) (adopted 14/11/1991, entered into force 20/10/1994).

> of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such."[62]

In *Russia – Measures Concerning Traffic in Transit*, a WTO Panel held that the clause of Art. XXI GATT was not 'totally self-judging' but should rather be interpreted and applied in good faith.[63] The good faith standard of review finds further support in arbitral practice and literature.[64]

Another important aspect relates to the question of whether the essential security and public order exceptions merely apply to cases of war and civil unrest, or also severe economic crises.[65] In the *LG&E v. Argentina* case, for example, the tribunal held:

> "The Tribunal rejects the notion that Article XI [Note: the essential security and public order exception of the US-Argentina BIT] is only applicable in circumstances amounting to military action and war. Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's

62. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14. Para. 222. See also: Article XXI(1)(d), Treaty of Friendship, Commerce and Navigation (Nicaragua-United States) (adopted 21/01/1956, entered into force 24/05/1958).
63. Report of the Panel, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R, 2019. Paras. 7.102 & 7.132.
64. Decision on Liability, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, 2006. Para. 214. Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (Kluwer Law International 2009). P. 494.
65. Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford University Press 2010). P. 345.

> economic foundation is under siege, the severity of the problem can equal that of any military invasion."[66]

This is an important finding considering that investment disputes involving particular countries have primarily arisen after a severe economic crisis, a prime example of this would be Argentina.[67] A notable difference between the essential security exceptions of the ECT and the US-Argentina BIT is that the former contains the limitative 'objective circumstances' under which it may be invoked while the latter does not.[68]

The final exception contained in Art. 24 ECT can be found in the fourth paragraph.[69] On the basis of this provision, there is no obligation to extend MFN treatment to investors of any other contracting party as a result of membership of a free trade area or customs union. Similar provisions can be found in the Model BIT's of various States, such as Austria, Sweden, Italy, the Netherlands, Germany, the UK, and the Belgium-Luxembourg Economic Union.[70] The reason behind this exclusion is comparable to the reason that the MFN treatment obligation usually does not apply in relation to taxation measures: the membership of free trade areas or customs unions is usually obtained after a carefull negotiation exercise where concessions were given and obtained in return and an unfettered MFN obligation would simply extend these advantages to third State nationals, which

66. Decision on Liability, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, 2006. Para. 238.
67. Note: arbitral practice in Argentina cases with regards to the state of necessity has, however, not been consistent. See: Michael Waibel, 'Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*' [2007] 20 Leiden Journal of International Law 637. P. 643. Stephan W. Schill, 'International Investment Law and the Host State's Power to Handle Economic Crises - Comment on the ICSID Decision in *LG&E v Argentina'* [2007] 24 Journal of International Arbitration 265. P. 278.
68. Report of the Panel, *Russia — Measures Concerning Traffic in Transit*, WT/DS512/R, 2019. Para. 7.101.
69. Article 24(4) ECT reads as follows:
The provisions of this Treaty which accord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment:
(a) resulting from its membership of a free-trade area or customs union; or
(b) which is accorded by a bilateral or multilateral agreement concerning economic co-operation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.
70. Article 3(4)(b), Austria Model BIT, 2008. Article 3(2), Sweden Model BIT, 2002. Article III(3), Italy Model BIT, 2003. Article 3(3), Netherlands Model BIT, 2004. Article 3(3), Germany Model BIT, 2008. Article 7(1)(a), UK Model BIT, 2008. Article 4(3), Belgo-Luxembourg Model BIT, 2002.

might be undesirable. For instance, in the absence of this exception, EU member States would have to give the advantages resulting from EU membership to the investors from non-EU ECT contracting parties without obtaining anything in return.

7.2.2. Relevance for Renewable Energy Investors

Despite the fact that Art. 24 ECT has never been invoked in practice, this does not exclude its relevance for RES investors since the most standards of treatment are not applicable in cases where a host State successfully invokes Art. 24.[71]

This will be illustrated by examples of cases where States might invoke both one of the general exceptions as well as the essential security and public order exception.

The general exceptions clause, which cannot be relied upon by States when implementing environmental measures, may be relevant for RES investors – although most likely not for purposes of the ECT. In the NAFTA RES case *Windstream Energy v. Canada,* the authorities in Ontario had imposed a moratorium on offshore wind projects. This decision was partially 'based on the information available at the time and applying the precautionary principle, that Ontario lacked the science necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring protection of human health and the environment.'[72] In particular, there were concerns about 'noise emissions, disturbance of benthic life forms, navigation, potential structure failure or safety hazards and decommissioning.'[73] In the eyes of the Canadian Minister the most pressing concern, however, was related to the effect that the construction of 100 turbines would have on Ontario's drinking water and how long these effects might last.[74] In addition, the drinking water concerns had 'cross-jurisdictional implications' and involved concerns regarding Canada's international obligations *vis-à-vis* the US on the basis of various treaties concerning the Great Lakes.[75]

71. Gloria Alvarez, 'Article 24 – Exceptions' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). Pp. 328-329.
72. Respondent's Counter-Memorial, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, 2015. Para. 252.
73. Ibid. Para. 255.
74. Id.
75. Ibid. Para. 256.

This case demonstrates that environmental concerns and legislation may affect the development of RES projects, even though States cannot use it to avoid international liability in ECT cases where it amounts to a violation of the treaty.[76]

In relation to the essential security and public order exceptions, Art. 24 might affect RES investors when an ECT tribunal accepts a line of reasoning similar to the *LG&E v. Argentina* tribunal on the basis of which severe economic crises might be included under this exception.[77]

In Spain, for example, many of the regulatory measures that affected RES investors and gave rise to so many ECT disputes, were adopted partially as a response to the economic crisis that hit the country after 2008.[78] The preamble of one of the measures that adversely affected PV investors in Spain, for example, explicitly stated that 'in the current context of crisis and tariff deficiency, it remains justified that the generators contribute to the costs attributable to the investments […]'.[79] Although the economic crisis of Spain in the wake of 2008 was perhaps not as severe as the Argentine crisis of the turn of this century, the fact that Art. 24(3) ECT is self-judging – contrary to similar provisions in some Argentine BIT's – may have significant implications for investors as breaches of the FET standard may be justified on the basis of Art. 24(3) ECT. Much would depend of course on the interpretation and application given to this provision by ECT tribunals, which until this day lies dormant.[80]

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76. In the *Windstream Energy v. Canada* case, the tribunal held that '[t]he Tribunal is unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it, were in themselves wrongful.' Although the tribunal also noted that 'the evidence before the Tribunal suggests that the decision to impose the moratorium was not only driven by the lack of science.' See: Award, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, 2016. Paras. 376 & 377.
77. Decision on Liability, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, 2006. Para. 238.
78. Iñigo del Guayo Castiella, 'Promotion of Renewable Energy Sources by Regions: The Case of the Spanish Autonomous Communities' in Marjan Peeters *et al* (eds.), *Renewable Energy Law in the EU – Legal Perspectives on Bottom-Up Approaches* (Edward Elgar 2014). P. 67. Iñigo del Guayo, 'Energy Law in Spain' in Martha M. Roggenkamp *et al* (eds.), *Energy Law in Europe – National, EU and International Regulation* (Oxford University Press 2016). P. 1033.
79. The preamble of Royal Decree Law 14/2010 was quoted in the ECT *Charanne v. Spain* case. See: Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 167.
80. See for example: Final Award, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, 2018. Para. 352.

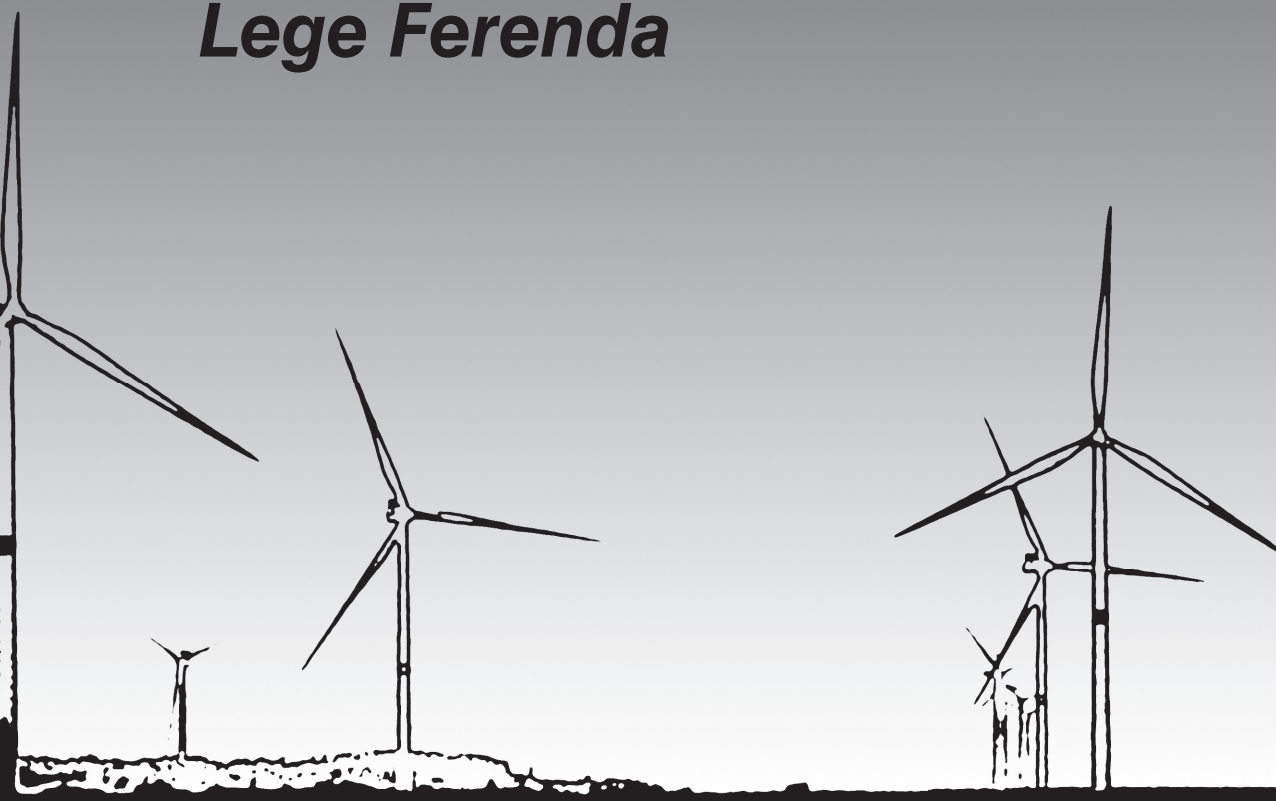
7.3. Conclusion

This chapter addressed certain exceptions contained in the ECT that may affect the application of the investment chapter. In practice, Art. 21 ECT contains the most relevant exception for RES investors, as was demonstrated by reference to RES investment disputes arising in Spain, the Czech Republic, and Italy. Since RES investors in all these three countries were confronted with taxation measures that *de facto* reduced financial support, Art. 21 ECT potentially contains a loophole. However, arbitral practice seems to mitigate these concers. In particular the *Yukos* and *Antaris* cases demonstrate that taxation measures which aim to achieve a very different goal than raising general revenue for the State may not qualify for exemption under Art. 21 ECT.

Contrary to Art. 21, the general exceptions clause of Art. 24 ECT has not yet played a role in practice. Nevertheless, in particular Art. 24(3) could be invoked by countries that adopted measures in times of economic distress, as happened in the Spanish RES cases. By reference to the public order exception of Art. 24(3)(c) ECT – and the fact that the chapeau of Art. 24(3) is 'self-judging' – a respondent could try to justify measures that would otherwise violate Art. 10 ECT.

CHAPTER 8.

Facilitating Renewable Energy Investments: The *Lege Ferenda*



8.1. SHORTCOMINGS IN THE EXISTING LEGAL FRAMEWORK OF THE ECT

In the previous chapters, the existing legal framework was extensively analyzed. After this analysis, and in light of the considerations addressed in chapters 2 and 3, the following shortcomings can be identified:

· As a general remark, the ECT's current legal framework does provide for investment protection but provisions regarding investment promotion are largely lacking. In that regard, the ECT currently only provides for investment promotion through protection. However, for a legal framework to facilitate RES investments, more comprehensive commitments would be desirable since empirical research shows that IIA's that merely provide for investment protection merely have a marginal effect on flows of FDI.[1]

· Regarding Art. 10(1) ECT, the provision that contains the most important standards of treatment. The current provision already provides investors with quite extensive rights that they can invoke *vis-à-vis* the host State. For example, in ECT arbitral practice it is firmly established that the FET standard protects legitimate expectations of investors. Also, the non-impairment standard prohibits unreasonable measures that impair an investment. Finally, by virtue of the umbrella clause, contractual commitments are protected under the treaty. In that sense, a higher level of investment protection is not necessary, especially given the fact that the ECT already provides for a high level of investment protection in comparison to other IIA's and especially in comparison to recent IIA's. Rather, the standards laid down in Art. 10(1) can be improved by providing more clarity, which would enhance legal certainty of the ECT. For example, both the FET standard and the non-impairment standard contain vague and ambiguous language which might make it difficult to predict the outcome of a claim based on these provisions. Taking into account that these standards are important

1. Jonathan Bonnitcha, Assessing the Impacts of Investment Treaties: Overview of the Evidence (Winnipeg, mb: iisd, 2017). Pp. 3-4. <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf, accessed 1 November 2018> accessed on 09/06/2019.

for investors, especially in those cases where governmental interference does not come close to expropriation, more clarity and predictability should be welcomed.

· With regards to Arts. 10(2) and (3) ECT, the lack of pre-establishment rights is a shortcoming in the ECT. Currently, ECT contracting parties are under no obligation what so ever to admit foreign energy investors. This means that the treaty does little to reduce barriers to investment. The inclusion of pre-establishment rights on the basis of NT and MFN and/or the inclusion of market access rules would contribute to the ECT as a facilitator of RES investments.

· In relation to Art. 10(11) ECT, the fact that RES investors can only challenge TRIM's if they are imposed upon them when they are already established in a jurisdiction is a shortcoming. In a sector where FDI is to a significant extent regulatory driven, this means that RES investors are currently unable to contest LCR's in RES policy schemes if these rules are adopted prior to when the investment was made. This means that investors can do little to reduce barriers to investment, even if these are discriminatory in nature.

· Pertaining to Art. 11 ECT, the lack of international commitments under the current ECT framework with regards to the entrance of key personnel is a shortcoming. In the RES sector expertise, both technical and non-technical, is of profound importance to ensure the success of an investment. Currently, however, the ECT does not impose any legally binding commitments upon contracting parties to allow foreign investors the entrance of their personnel on their territory. The same holds true with regards to persons that seek to render services to investments.

· Touching upon Art. 13 ECT, the main shortcoming is the fact that the ECT does not contain any textual guidance on where to draw the line between indirect expropriation and non-compensable government regulation. This does not mean, however, that Art. 13 ECT suffers from the same level of unpredictability as Art. 10(1) ECT. Quite the contrary, it seems that the provision has been interpreted

and applied in a rather consistent manner. Nevertheless, it is not unlikely that, if the provision would be negotiated today, it would be accompanied with an interpretive annex that can nowadays be found in many new IIA's.

· FInally, the tax carve-out of Art. 21 ECT may prove to be a loophole in the ECT that may be open to abuse by host States. The main exception to this rule is that taxation measures that are expropriatory may still violate the ECT. However, the threshold of liability under Art. 13 ECT is very high and will in cases of *bona fide* taxation measures most likely not be reached. This means that under the current ECT framework, States may for instance not be allowed to reduce FIT's if this is in violation of any legitimate expectations that are protected under the treaty, yet they may impose taxes on investors that may yield the same result.

This chapter will analyze what improvements could be implemented in the ECT with the aim of facilitating RES investments, all of this again in light of the topics discussed in chapters 2 and 3. In line with the separation made throughout this dissertation, investment protection and promotion will be addressed in turn.

8.2. INVESTMENT PROTECTION

As became clear from the previous chapters, Part III of the ECT provides for a relatively high level of investment protection, in particular in comparison to more recent IIA's. Also, due to the vague nature of certain provisions, the treaty has not been applied consistently which undermines legal certainty under the treaty.

As stated in chapter 1, the contracting parties to the ECT are currently in the process of modernizing the ECT. Since the Energy Charter Conference indicated that current main 'international trends' will be taken as 'primary reference' for the modernization process, the practice in certain new IIA's is a good indication for the direction that the modernization process will take regarding investment protection.[2] In fact, the EU, which will be represented in the modernization

2. Energy Charter Secretariat, Approved Topics for the Modernisation of the Energy Charter Treaty (29 November 2018) <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> As Accessed

process by the European Commission and also negotiate on behalf of the Member States, has already indicated it believes that its approach, as evidenced in treaties with Canada, Vietnam, Singapore, and Mexico, should also be adopted in the context of the ECT.[3]

In practice, this will most likely mean that the contracting parties will attempt to achieve an appropriate balance between, on the one hand, effective standards of investment protection while, on the other hand, ensuring that the host States' right to regulate is respected.[4] Given the fact that the approach adopted in recent IIA's concluded by the EU provides for more clarity on standards of investment protection that have given rise to inconsistent decisions in ECT arbitration, it will address one of the major identified shortcomings in the ECT current legal framework.

Nevertheless, adopting such an approach could have significant consequences for RES investors. Recent IIA's often contain less investment protection standards, in particular the non-impairment obligation, umbrella clause, and effective means clause are seemingly out of fashion. Furthermore, standards that are retained, such as FET, MCPS, indirect expropriation, NT, and MFN are often more clearly defined which does not only enhance legal certainty but it often also leads to a lower level of investment protection.

As was seen in chapter 5.2, the FET standard is in practice the most important investment protection standard for RES investors and more specifically the protection of legitimate expectations. However, when looking at the approaches adopted in more recent IIA's, regardless of whether one takes the EU's approach of explicitly spelling out the content of the FET standard or, alternatively, ties the FET standard to the international minimum standard of treatment under customary international law, these do not necessarily protect the investors' legitimate expectations.[5] In addition to that, the CPTPP, EU IIA's and also the 2019

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on 17/12/2018.

3. Council of the European Union, 'Negotiating Directives for the Modernisation of the Energy Charter Treaty' (2019, 9305/19). P. 3. European Commission, 'Recommendation for a Council Decision Authorising the Entering Into Negotiations on the Modernization of the Energy Charter Treaty' (COM(2019) 231 final, 14/05/2019). P. 2.
4. Indeed, the list of approved topics for modernization does not only include the standards of investment protection, but it also makes reference to the right to regulate, sustainable development, and corporate social responsibility.
5. See section 5.2.1. of this dissertation.

Netherlands Model BIT specify that decisions not to issue, renew or maintain subsidies do not necessarily amount to a violation of the treaty.[6]

Since a modernized ECT will not only apply to RES investments, but also to energy investments whose activities might have to be phased out in light of climate change mitigation efforts and the energy transition, striking an appropriate balance is of profound importance.

Hence, instead of maintaining a FET standard that provides for a high level of investment protection for energy investments across the board, the contracting parties could consider including investment protection standards specifically targeting RES investments. Since ECT practice demonstrates that most RES investment disputes concern the reduction of financial support, which can significantly affect the economic viability of a RES project, these provisions would – ideally – protect the fundamental characteristics of support schemes. As identified by several ECT tribunals, these include financial support and priority dispatch.[7] These aspects will be addressed in turn.

8.2.1. Financial Support

Concerning financial support, inspiration could be drawn from ECT jurisprudence. In *Blusun v. Italy,* the tribunal proposed the following standard of review:

> 'In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.'[8]

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6. Article 2(4), Netherlands Model BIT, 2019. Article 9.6(5), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018). Article 8.9(3) & (4), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
7. See section 8.1.2. below.
8. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 319(5).

This standard of review in principle protects subsidies granted to RES investors although this protection is not absolute and leaves room for States' to revise their support schemes if circumstances require. In such circumstances, a proportionality test should be used to ensure that a fair balance is reached between the public and private interests involved.

Since the EU is a frontrunner in the energy transition, inspiration could also be drawn from recent developments in EU energy law. The 2018 EU RES Directive for example contains a provision that is aimed at protecting the interests of RES investors with regard to the stability of financial support:

> '[…] Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support.'[9]

This is an innovation in comparison to the earlier 2009 RES Directive, which did not contain a comparable provision. Hence, the very significant regulatory changes to support schemes, as seen in Spain for instance, were not contrary to EU energy law.

Furthermore, the article also makes clear that Member States may only adjust the level of support if this is done in accordance with objective criteria that are established in the original support scheme. This can prevent situations as were seen in the Spanish RES sector where a support scheme was replaced with a fundamentally different support scheme.

8.2.2. Priority Dispatch

Although a vast majority of the investment disputes involving RES investors concerned regulatory changes to financial support, the importance of priority dispatch cannot be overstated.[10] For example, in the *Charanne v. Spain* case, the tribunal identified that the support scheme had two fundamental characteristics:

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9. Article 6(1), Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.
10. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Pp. 91-92.

the presence of FITs 'as well as the possibility to sell their electricity production to the system in priority.'[11] In a similar vein, the *Eiser v. Spain* tribunal also identified priority dispatch as a feature of RD 661/2007 that allowed the investors to obtain a significant amount of non-recourse financing.[12] Therefore, the importance of priority dispatch should not be overlooked.

In the recent reforms of the electricity markets in the EU, priority dispatch for RES producers was a contested issue.[13] The European Commission proposed to remove priority dispatch for most new installations but refrain from applying the new standard to investments in existence at the time of entrance into force of the new regime, thereby respecting the rights of established investors even though not all stakeholders supported this view.[14] In the end, the proposal of the Commission was largely maintained and one could say that this is the proper way to reform RES law: it would affect the situation of future RES investors without adversely affecting those RES investors that invested on the basis of the privileges existing at the time that such investments were made.[15]

For those RES regimes where support is not only granted through subsidies, but also through support in the form of priority dispatch ensuring that this is not withdrawn in relation to existing investments is thus also of importance. Supplementing the provisions which ensures financial stability with a provision

11. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Para. 533.
12. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 412. See also: Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 560.
13. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Pp. 91-92.
14. Ibid. P. 91. Articles 11(2) & (4), Proposal for a Regulation of the European Parliament and of the Council on the Internal Market for Electricity (recast), COM(2016) 861 final/2. ACER, 'Renewables in the Wholesale Market ' (European Energy Regulators' White Paper No 1, 2017). <http://www.acer.europa.eu/Official_documents/Position_Papers/Position%20papers/WP%20ACER%2001%2017.pdf> accessed 13/06/2019. The European Federation of Energy Traders also proposed stricter changes to the rules than the Commission, see: European Federation of Energy Traders, 'RES Integration and Market Based Dispatch' (2017). Pp. 3-4 <https://efet.org/Files/Documents/Electricity/EFET_CEP%20amendments_RES%20%20Redispatch_June%202017.pdf> accessed on 13/06/2019.
15. Nikos Lavranos & Cees Verburg, 'Renewable Energy Investment Disputes – Recent Developments and Implications for Prospective Energy Market Reforms' in Martha Roggenkamp *et al* (eds.), *European Energy Law Report XII* (Intersentia 2018). Pp. 91-92. Article 12, Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the Internal Market for Electricity (Recast) OJ L 158/54.

that ensures that priority dispatch will not be withdrawn for investments that were operational before a new regime enters into force may thereby safeguard the interests of RES investors.

8.3. INVESTMENT PROMOTION IN THE RENEWABLE ENERGY SECTOR

A review of the ECT's legal framework revealed that it primarily provides for investment promotion through protection.[16] According to a recent meta-research, however, IIA's that merely provide for investment protection 'probably do have some impact on FDI flows from developed to developing countries, although these effects are not so large that they can be identified consistently across a range of studies that apply differently specified econometric models to different data sets.'[17] Therefore, in order to effectively facilitate RES investments, more is required than merely post-establishment investment protection. This is all the more pertinent since economic research indicates that the effects of IIA's to attract FDI are primarily visible in the extractive industries sectors rather than in high-tech sectors.[18]

In chapters 3.3 and 3.4 it was argued that trade and investment in the RES sector are closely related and that, therefore, an international legal framework governing trade and investment should reflect this. Although this chapter will be limited to investment promotion and liberalization, it will make linkages to provisions that may promote investment while also affecting trade in goods or services. This chapter will, firstly, explore various ways in which the ECT could liberalize flows of FDI in the RES sector by providing for market access for foreign investors. Secondly, it will consider investment promotion provisions that are common in IIA's. Finally, several investment promotion provisions that are currently already in the ECT – but outside of Part III – will be considered.

8.3.1. Investment Liberalization: Market Access

Market access, which is the ability of investors to enter a given market, is of profound importance for investors: if they are not allowed to make an investment, they cannot and will not make an investment regardless of the RES potential of

16. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (United Nations 2008). P. xi.
17. Jonathan Bonnitcha, 'Assessing the Impacts of Investment Treaties: Overview of the Evidence' (IISD 2017). P. 4.
18. Id.

the State concerned. This does not only hold true with regards to market access to the electricity market, but also with regards to all other relevant economic activities that are indispensable for the RES sector, such as construction, engineering, and transport. At present, the ECT does not liberalize flows of FDI between its contracting parties: investors do not obtain market access to markets and there is no obligation under the ECT to grant foreign investors market access on a non-discriminatory basis. Thus, not only companies that would like to develop RES projects may lawfully be confronted with all sorts of discriminatory barriers, such as restrictions on landownership by foreign entities. Services providers may be confronted with discriminatory barriers to FDI, such as economic needs tests, and equity participation requirements. While individual investors may be able to negotiate market access through bilateral negotiations with the host State, this will raise transaction costs.[19]

To address this shortcoming, Art. 10(2) should provide for binding pre-establishment rights on the basis of NT and MFN, whichever is more favorable, to ensure that the ECT entitles an investor to treatment on a basis of the most favorable treatment accorded to any other investor. Also, Art. 26 ECT should be amended. Currently, Art. 26 only provides investors that have already made an investment in the area of a contracting party with a tool to obtain redress. Ideally, the jurisdiction of ECT tribunals should be extended to also include investors that are seeking to make an investment. The definition of investor under NAFTA can be used as an example, where an investor means 'a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.'[20] This explicitly includes investors that are seeking to make an investment. In addition, Art. 26 ECT should also provide jurisdiction with regards to the 'making of investments' as defined in Art. 1(8) ECT.

Even though these amendments would not go as far as requiring a host State to completely open up its doors to foreign investors, it would ensure that foreign investors are not accorded treatment less favorable than that accorded to any other investor.

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19. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 25.
20. Article 1139, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994). In a similar vein, see the definition of investor under the CETA: Article 8.1, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).

The liberalization of FDI by providing for market access to investors may also benefit services providers that would like to render RES services through the presence of a commercial presence.[21] There are, however various ways in which the contracting parties can liberalize FDI. The following sections will explain the various options that are available to treaty negotiators. As will be seen, the drafting methodology chosen can significantly affect the level of liberalization and transparency.

8.3.1.1. Scheduling Commitments: Negative or Positive Lists

Where it concerns the appropriate drafting methods for the liberalization of FDI, inspiration can be drawn from the techniques used in trade and investment agreements concerning trade in services.

In relation to trade in services under GATS, one has to make a distinction between general obligations, *i.e.* those obligations which apply to any measure affecting trade in services, and specific commitments which only apply when WTO members have explicitly accepted them.[22] General obligations can be found in Part II of the GATS and concern amongst others, MFN treatment, transparency, and domestic regulation. These commitments are not, however, commitments that go to the core of liberalizing FDI and services under Mode 3: these are found in commitments regarding market access and NT.[23]

On the basis of Art. XVI GATS on market access, members shall not maintain or adopt measures which impose:

- limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

21. Panagiotis Delimatsis, 'The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit' [2017] 20 Journal of International Economic Law 583. P. 595.
22. Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013). P. 403. Mitsuo Matsushita, Thomas Schoenbaum, Petros Mavroidis & Michael Hahn, *The World Trade Organization – Law, Practice, and Policy* (Oxford University Press 2015). P. 567.
23. See for example: Articles 8.4-8.6, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).

- limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

- limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

- limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

- measures which restrict or require specific types of legal entities or joint venture through which a service supplier may supply a service; and

- limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Services suppliers in the RES sector that would like to supply services through a commercial presence often encounter barriers to investment that could be addressed on the basis of the list above. The OECD identified the following common barriers: economic needs tests, foreign equity limits, and restrictions on land ownership or real estate.[24] The market access obligation of Art. 8.4 CETA is comparable to the list above although phrased slightly different; which reflects that the provision applies to both investors and services suppliers as it is contained in the investment chapter of CETA.

On the basis of the NT obligation of the GATS, as laid down in Art. XVII, 'each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.'

24. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). Pp. 10-11.

Under the GATS, obligations concerning market access and NT only apply when WTO Member States specified so in their schedule of commitments.[25] Under GATS schedules are based on the 'services sectoral classification list' (W/120). Thus, in the services schedule WTO members indicate whether or not NT and market access obligations apply in relation to specific services sectors. In the case of GATS, a so-called positive list approach is adopted: 'Services only benefit from market access […] and national treatment […], if the pertinent service sector is included in the schedule of specific commitments.'[26] In practice, WTO members often impose conditions, qualifications, and limitations on NT commitments.[27] For that reason, it has been said that 'the GATS has not been a showcase for market access in trade in services.'[28] For example, NT in relation to a specific services sector may be granted only to certain modes of supply.[29]

The NAFTA was the first agreement to adopt a so-called 'negative list approach.'[30] On the basis of this approach, liberalization commitments apply across the board unless an explicit exception is contained in the 'negative list' of non-conforming measures.[31] More recently, the CETA has adopted this approach.[32]

Of course, combinations of both approaches are also possible. The Trade in Services Agreement (TiSA) initiative, a plurilateral trade in services agreements

25. Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013). Pp. 403 & 517. Mitsuo Matsushita, Thomas Schoenbaum, Petros Mavroidis & Michael Hahn, *The World Trade Organization – Law, Practice, and Policy* (Oxford University Press 2015). P. 585. Marie-France Houde, Akshay Kolse-Patil & Sébastien Miroudot, 'The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements' (OECD Trade Policy Working Paper No. 55, 2007). P. 7.
26. Mitsuo Matsushita, Thomas Schoenbaum, Petros Mavroidis & Michael Hahn, *The World Trade Organization – Law, Practice, and Policy* (Oxford University Press 2015). P. 585. Rudolf Adlung & Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' [2014] 48 Journal of World Trade 191. P. 191-192.
27. Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013). P. 404.
28. Juan Marchetti & Martin Roy, 'Services Liberalization in the WTO and in PTAs' in Juan Marchetti *et al* (eds.), *Opening Markets for Trade in Services – Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press 2008). P. 62.
29. Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2013). P. 404.
30. Rudolf Adlung & Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' [2014] 48 Journal of World Trade 191. P. 191-192.
31. Id.
32. Articles 8.4, 8.5 & 8.15, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).

that is/was being negotiated by a group of WTO members outside the WTO, uses a positive list for market access and negative list for NT.[33]

This negative list approach is often considered to lead to a deeper level of liberalization amongst the contracting parties.[34] The following arguments are often used to support this statement. Firstly, the negative list approach fosters transparency as it is easy to identify which measures are excluded from coverage.[35] Secondly, the negative approach might encourage a 'pro-liberalization dynamic' during the negotiations as governments might want to avoid long lists of exceptions.[36] Thirdly, the negative list approach would, in the absence of an exception to the contrary, liberalize any future services sector which is yet unknown due to the fact that it is covered by the agreement.[37] According to Low and Mattoo, however, this final point is also a reason why States might be hesitant to make use of the negative list approach.[38]

8.3.1.2. Additional Obligations: Standstill and Ratchet Clauses

Besides assuming specific commitments in relation to market access and NT, negotiating parties can also agree on more far reaching commitments that are aimed yielding irreversible results. On the basis of so-called standstill clauses,

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33. European Commission, 'Services and investment in EU trade deals Using 'positive' and 'negative' lists' (European Commission, 2016). P. 6. <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf> accessed on 14/3/2018. Juan Marchetti & Martin Roy, 'The TISA Initiative: An Overview of Market Access Issues' [2014] 48 Journal of World Trade 683. P. 684. See Articles I-3 & I-4 of the leaked versions of the TiSA core text, available at: <https://wikileaks.org/tisa/document/20160621_TiSA_Core-Text/> accessed on 14/3/2018.
34. Panagiotis Delimatsis, 'The Evolution of the EU External Trade Policy in Services – CETA, TTIP, and TiSA after Brexit' [2017] 20 Journal of International Economic Law 583. P. 596. Pierre Latrille & Juneyoung Lee, 'Services Rules in Regional Trade Agreements – How Diverse and how Creative as Compared to the GATS Multilateral Rules? (WTO, Staff Working Paper ERSD-2012-19, 31 October 2012). Pp. 7-8.
35. Patrick Low & Aaditya Mattoo, 'Is There a Better Way? Alternative Approaches to Liberalization Under the GATS' (Worldbank 1999) P. 22. <https://pdfs.semanticscholar.org/e8c8/68af3e3dc8d0427c9cfabc47478b674014b4.pdf> accessed on 10/07/2019. Marie-France Houde, Akshay Kolse-Patil & Sébastien Miroudot, 'The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements' (OECD Trade Policy Working Paper No. 55, 2007). P. 33.
36. Patrick Low & Aaditya Mattoo, 'Is There a Better Way? Alternative Approaches to Liberalization Under the GATS' (Worldbank 1999) P. 22. <https://pdfs.semanticscholar.org/e8c8/68af3e3dc8d0427c9cfabc47478b674014b4.pdf> accessed on 10/07/2019.
37. Id.
38. Id.

a State can assume an obligation that is 'intended to lock-in the applied regime at the time an agreement enters into force.'[39] Under GATS, such commitments were sometimes included in schedules of commitments.[40] A standstill clause is also proposed in the core text of TiSA:

> "The conditions and qualifications on national treatment […] shall be limited to measures that a Party maintains on the date this Agreement takes effect, or the continuation or prompt renewal of any such measures."[41]

Thus, on the basis of this provision any condition and qualification concerning NT may not go beyond the exceptions made in the schedule of commitments. At present, the ECT contains a voluntary stand still clause in Art. 10(6)(a), by allowing contracting parties to make declarations that they intent not to introduce new exceptions to NT or MFN treatment concerning the making of investments.

Ratchet clauses go even further than that, as they automatically lock in unilateral liberalization efforts.[42] A clear example of a ratchet clause in relation to NT can be found in Art. II-2(3) TiSA:

> "If a Party amends a measure referred to in paragraph 2 in a way that reduces or eliminates the inconsistency of that measure with the treatment provided for in Article I-4 (National Treatment), as it existed immediately before the amendment, a Party may not subsequently amend that measure in a way that increases the inconsistency with the treatment provided for in Article I-4 (National Treatment)."

39. Rudolf Adlung & Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom-Up?' [2014] 48 Journal of World Trade 191. P. 200.
40. Id. See for example the schedule of Korea: WTO document GATS/SC/48/Suppl.3 of 26 February 1998.
41. Article II-2(2) of the leaked versions of the TiSA core text, available at: <https://wikileaks.org/tisa/document/20160621_TiSA_Core-Text/> accessed on 14/3/2018. See also Article 8.15(1)(c), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
42. Pierre Latrille & Juneyoung Lee, 'Services Rules in Regional Trade Agreements – How Diverse and how Creative as Compared to the GATS Multilateral Rules? (WTO, Staff Working Paper ERSD-2012-19, 31 October 2012). P. 22. Juan Marchetti & Martin Roy, 'The TISA Initiative: An Overview of Market Access Issues' [2014] 48 Journal of World Trade 683. P. 684.

Thus, on the basis of this provision, any measure that would bring discriminatory national legislation, that is exempted from the scope of the FTA, in line with the non-discrimination regime of that FTA the State may not subsequently amend the measure in a way that would again increase the inconsistency with the FTA, not even to the level that was previously applied and excluded from the scope of the FTA.

Especially the cumulative effect of these clauses is notable: when a negative list approach is used and a stand still clause applies, in principle all future barriers to investment and trade that are not in line with NT or market access concerning services under mode 3 are prohibited, even in relation to economic activities that are currently non-existent.[43]

8.3.2. Investment Promotion Provisions in IIA's

The investment promotion provisions as contained in existing IIA's often address a wide variety of topics.[44] A common denominator of these provisions is that they are often primarily hortatory in nature and the contracting parties often have a significant level of discretion in their application.[45] Below, various examples of investment promotion provisions that may be found in IIA's and that are relevant for RES investors will be provided for.

8.3.2.1. Investment Promotion Agencies

Investment Promotion Agencies (IPA) can play an important role in the facilitation of FDI. For foreign energy investors they may, for example, serve as a 'single window' where foreign investors can obtain all relevant information concerning the establishment of FDI and the appropriate steps to be taken in the regulatory process, including information on required permits, opportunities for investment incentives etcetera.[46] This could ease some of the informal barriers to investment, including a lack of transparency.[47] Furthermore, IPA's can play a role in exploring

43. Marie-France Houde, Akshay Kolse-Patil & Sébastien Miroudot, 'The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements' (OECD Trade Policy Working Paper No. 55, 2007). Pp. 4, 36, 39.
44. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (Geneva, 2008). P. 5.
45. Ibid. P. 6.
46. Energy Charter Secretariat, 'The Energy Charter Investment Facilitation Toolbox' (Brussels, 2017). P. 7. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (Geneva, 2008). P. 45. Articles 15 & 16, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.
47. UNCTAD, *Investment Promotion Provisions in International Investment Agreements*

market opportunities for investors and link potential business partners from various contracting parties.[48] These programs could aim at addressing specific needs in the RES sector in the various countries involved and contribute to reduced transactions costs.

8.3.2.2. Investment Incentives

Investment incentives are often a policy tool available to increase the inflow of FDI.[49] This particularly holds true for investments in the RES sector where investments are largely regulatory driven. Although the importance of financial support for RES investments is slowly decreasing due to the increased competitiveness of RES, it will remain a highly relevant policy instruments for years to come. Notwithstanding that it is probably impossible, and perhaps even undesirable, to make international arrangements concerning the design of a support scheme for RES, States could lay down certain principles. These could include that investors are treated in a non-discriminatory manner when applying for support, even if they are not yet established in a given jurisdiction, and that information concerning the support scheme can be obtained in the language of business (such as English) at the IPA. In the EU, the 2018 RES Directive lays down that support is to be granted in a market-based manner, which underlines that RES technology is increasingly mature and should, therefore, be exposed to market signals.[50] However, conditions in the relevant electricity market may be determinative for the exact design of a support scheme.

8.3.3. Existing Provisions in the ECT

At present various ECT provisions, located outside Part III, may already be relevant for purposes of investment promotion. This does not mean, however, that there is no room for improvement.

(Geneva, 2008). P. 38. See for example: Article 26, Free Trade Agreement between the EFTA States and the Republic of Lebanon (EFTA-Lebanon) (adopted 24/06/2004, entered into force 01/01/2007).

48. Articles 24-26, ASEAN Comprehensive Investment Agreement (adopted 26/02/2009, entered into force 24/02/2012). Article 18.6 and Annex 18A, Free Trade Agreement between the Republic of Korea and Singapore (Korea-Singapore) (adopted 04/08/2005, entered into force 02/03/2006).
49. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (Geneva, 2008). P. 33.
50. Article 4, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.

8.3.3.1. Transparency

Transparency can encourage FDI by providing foreign investors with the knowledge and information relevant for investment decisions. A lack of transparency will raise transaction costs for investors and reduce efficiency.[51] In addition, transparency is often considered to be part of good governance best practices.[52] Therefore, it is unsurprising that IIA's sometimes contain provisions concerning transparency.[53] The Economic Partnership Agreement between Japan and Thailand for example requires the contracting parties to publish or otherwise make available 'its laws, regulations, administrative procedures, and administrative rulings of general application'.[54]

An interesting example is Art. 4 concerning transparency from the 2019 Netherlands Model BIT:

> "Each Contracting Party shall ensure that its laws, regulations, judicial decisions, procedures and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them. Whenever possible, such instruments will be made available through the internet in English."[55]

At present, Art. 20 ECT is comparable with the provision above although it does not contain a reference to providing documents through the internet. Also, Art. 20(3) states that '[e]ach Contracting Party shall designate one or more enquiry points to which requests for information about the above-mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request.'

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51. Mehmet Ögütçü, 'Good Governance and Best Practices for Investment Policy and Promotion (OECD, 2002). P. 5.
52. Id. See also: Energy Charter Secretariat, 'The Energy Charter Investment Facilitation Toolbox' (Brussels, 2017). P. 4.
53. See for example: Article 101, Agreement between Japan and the Kingdom of Thailand for an Economic Partnership (Japan-Thailand) (adopted 03/04/2007, entered into force 01/11/2007). Article 58, Agreement on Partnership and Cooperation between the European Communities and the Russian Federation (European Union-Russian Federation) (adopted 24/06/1994, entered into force 01/12/1997).
54. Article 101(1), Agreement between Japan and the Kingdom of Thailand for an Economic Partnership (Japan-Thailand) (adopted 03/04/2007, entered into force 01/11/2007).
55. Article 4, Netherlands Model BIT, 2019.

8.3.3.2. Trade Related Investment Measures

The ECT's provision on TRIM's was extensively discussed in section 6.3. For RES investors, this provision is highly relevant as LCR's have been referred to as the main policy impediment to investments in the value chain of RES technology.[56] As elaborated in sections 3.4.2.1 and 6.3, LCR's can have very significant consequences for RES investors. The main shortcoming of the current legal framework of the ECT in relation to TRIM's is that merely TRIM's that are applied to existing investment at the time of such application are actionable under the ECT for private investors. This means that only companies that are already established in a given jurisdiction can benefit from the provision, and only if the LCR's are applied to its existing investments while excluding prospective projects. In a sector where investments are still regulatory driven, meaning that investments are most likely to occur after regulatory frameworks have been enacted, this means that important barriers to investment cannot be addressed if this regulatory framework incorporates LCR's.[57] In addition, Art. 5 ECT only addresses TRIM's in relation to trade in goods while LCR's can also affect trade in services. As was identified in section 3.3, services are just as important for the successful realization of an RES project as goods and expressed in terms of value, the value of RES services exceeds the value of RES goods in many projects. Therefore, an improved provision concerning LCR's should address services, goods, and investment/investors more generally. In that regard, the ECT could draw inspiration from Chapter 7 'Non-tariff Barriers to Trade and Investment in Renewable Energy Generation' of the EU-Vietnam Free Trade Agreement (EUVFTA). Article 7.4 of this chapter states:

> "(1) A Party shall:
>
> (a) refrain from adopting measures providing for local content requirements or any other offset affecting the other Party's products, service suppliers, investors or investments;

56. OECD, *Overcoming Barriers to International Investment in Clean Energy: Green Finance and Investment* (2015). P. 57. Cees Verburg, 'Local Content Requirements in Renewable Energy Schemes - Government Procurement or a Violation of International Obligations?' [2017] 35(5) International Energy Law Review 185. P. 186.
57. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. Pp. 28-34.

> (b) refrain from adopting measures requiring to form partnerships with local companies, unless such partnerships are deemed necessary for technical reasons and the Party can demonstrate these upon request by the other Party;
>
> (c) ensure that any measures concerning the authorisation, certification and licensing procedures that are applied, in particular, to equipment, plants and associated transmission network infrastructures, are objective, transparent, non-arbitrary and do not discriminate between applicants from the Parties;
>
> […]
>
> (e) ensure that the terms, conditions and procedures for the connection and access to electricity transmission grids are transparent and do not discriminate against suppliers of the other Party."[58]

The scope of Chapter 7 EUVFTA extends 'to measures which affect trade and investment between the Parties related to the generation of energy from renewable and sustainable sources.'[59] This means that the provision quoted above addresses LCR's in goods, services, investments, and investors. Also, local equity participation requirements are expressly prohibited. As identified in section 3.4.3.1 concerning services supplied through 'Mode 3', such local equity participation requirements constitute a common barrier to FDI in the RES sector.

Another aspect that deserves attention is the application of this provision. As demonstrated by the *Mesa v. Canada* NAFTA case, even a treaty that provides for national treatment in the pre-establishment phase of an investment does not apply retroactively.[60] This means that an investor has to be able to establish that an arbitral tribunal would have jurisdiction over a LCR claim even if the investor has not yet made an investment, otherwise the tribunal lacks temporal jurisdiction.

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58. Article 7.4, EU-Vietnam Free Trade Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending).
59. Ibid. Article 7.3(1).
60. Award, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, 2016. Paras. 324-338.

Finally, remedies in relation to violations of LCR's is also a relevant issue. Can a tribunal order a State to withdraw an LCR? Usually, investment tribunals are very reluctant in ordering specific conduct as the State's right to regulate is respected.[61] Also, one can wonder whether monetary remedies are an appropriate remedy. After all, what is the damage?

8.3.3.3. Transfer of Technology

Flows of FDI may also have an impact on technology transfer. In fact, the WTO has held that '[i]ssues related to transfer of technology on the one hand and, international trade liberalization and foreign direct investment, on the other, are closely interlinked.'[62] More particularly, 'FDI is generally acknowledged as one of the most important mechanisms for technology transfer' as it may lead to positive knowledge spillovers.[63]

In the context of RES and climate change mitigation efforts, transfer of technology is of particular relevance.[64] It is, for instance, desirable that developing countries, many of which lack a developed RES industry, also adopt RES and avoid traditional unsustainable energy sources.[65] The diffusion of RES technology is thus of great importance for an energy transition. Therefore, the United Nations Framework Conference on Climate Change (UNFCCC) addresses technology transfer:

> "The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties,

61. See for example: Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 425.
62. WTO, 'Detail Presentation of Trade and Technology Transfer' (WTO E-learning). P. 2. <https://ecampus.wto.org/admin/files/Course_385/Module_1605/ModuleDocuments/TD_Ttt-L2-R1-E.pdf> accessed on 07/05/2018.
63. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). Pp. 46 & 54.
64. Frauke Urben, 'China's rise: Challenging the North-South Technology Transfer Paradigm for Climate Change Mitigation and Low Carbon Energy' [2018] 113 Energy Policy 320. Julian Kirchherr & Frauke Urban, 'Technology Transfer and Cooperation for Low Carbon Energy Technology: Analysing 30 Years of Scholarship and Proposing a Research Agenda' [2018] 119 Energy Policy 600.
65. Charikleia Karakosta, Haris Doukas & John Psarras, 'Technology Transfer within the New Climate Regime' in Braden Everett *et al* (eds.), *Technology Transfer and Intellectual Property Issues* (Nova Science Publishers 2010). P. 2.

> particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies."[66]

Also, in order to develop RES projects in an economically successful manner, projects will have to be constructed and operated properly, which requires the proper skills and technologies. In that regard, the lack of reliable and capable domestic contractors may make foreign investors skeptical to invest in RES projects, especially when a protectionist trade and investment policy make it cumbersome to overcome domestic shortages by importing goods and services from abroad. As identified in chapter 3.3, goods and services in the RES sector are often sold in tandem because the purchaser of a wind turbine is often not only interested in the hardware, but also in the knowledge to engineer, construct, operate, and maintain a wind turbine.

Various IIA's also contain provisions on transfer of technology. However, they often do so in a relatively hortatory manner by adopting language that avoids real substantive commitments.[67] At present, Art. 8 ECT concerns transfer of technology:

> "(1) The Contracting Parties agree to promote access to and transfer of energy technology on a commercial and non-discriminatory basis to assist effective trade in Energy Materials and Products and Investment and to implement the objectives of the Charter subject to their laws and regulations, and to the protection of Intellectual Property rights.
>
> (2) Accordingly, to the extent necessary to give effect to paragraph (1) the Contracting Parties shall eliminate existing and create no new obstacles to the transfer of technology in the field of Energy

66. Article 4(5), United Nations Framework Conference on Climate Change (adopted 04/06/1992, entered into force 21/03/1994).
67. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (Geneva, 2008). P. 29.

> Materials and Products and related equipment and services, subject to non-proliferation and other international obligations."

The emphasis of technology transfer on a non-discriminatory and commercial basis reflects that the ECT is founded on market-based principles. At first sight, this might be a barrier to economic development in developing countries, which for that reason sometimes pursue protectionist policies and prescribe forced technology transfer. The US, for example, often complains that China adopts such policies.[68] Allegedly, China enforces foreign ownerships restrictions, 'such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from' US companies.[69] Such requirements are clearly discriminatory and relate directly to FDI. This example also exposes the main danger for companies. While they may have committed significant resources to R&D, (forced) technology transfer main result in 'technology theft or unwanted spillovers to competitors.'[70] This, in turn, may dissuade companies to commit resources to R&D. Hence, there are also IIA's that explicitly limited the ability of contracting parties to impose technology transfer requirements.[71]

It is therefore of profound importance that a careful balance is struck: on the one hand technology transfer is essential for a successful energy transition while, on the other hand, forced technology transfer may result in less resources spent on R&D which may undermine innovation even though innovation is equally essential for a successful energy transition.

Notwithstanding the difficulties of technology transfer and the resulting political implications, the business practice of the RES sector provides ample of opportunity for technology transfer in line with Art. 8 ECT, that is on a commercial and non-discriminatory basis. This even holds true for countries that are only marginally integrated in the value chain of RES generation equipment.

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68. Simon Lester, 'Forced Technology Transfer and the WTO' (2018) <http://worldtradelaw.typepad.com/ielpblog/2018/03/forced-technology-transfer-and-the-wto.html> accessed on 08/05/2018.
69. Id.
70. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 55.
71. Article 15(8)(f), United States – Singapore Free Trade Agreement (United States-Singapore) (adopted 06/05/2003, entered into force 01/01/2004).

As said, OEM's often sell RES hardware in tandem with related services. In practice, the establishment of a local presence by foreign services providers is by far the most important method to supply services.[72] In order to supply services through a local subsidiary, an investment is necessary: a foreign RES company cannot establish a local presence in another country without investing. However, it has been said that there are several reasons why foreign services suppliers cannot compete on a level playing field in various countries, 'many of which involve restrictions on foreign investment.'[73]

From a development perspective, the establishment of local subsidiaries by foreign RES companies offers interesting opportunities as research shows that these companies often rely on local personnel.[74] This also means that there are many opportunities for local job creation, transfer of skills and knowledge, and local partnerships.[75] Common mechanisms to transfer knowledge include the training of local personnel by the foreign parent company, intra-corporate transferees, providing information on relevant technologies and equipment and the dissemination of knowhow.[76]

Besides establishing a local presence, the presence of foreign natural persons is also a common mode of services supply in the RES sector.[77] According to the OECD, 'the temporary presence of highly skilled foreign personnel and the establishment of a foreign commercial presence may provide opportunities for person-to-person communication and learning by doing.'[78] Given the controversial nature of this mode of services supply, as it relates directly to

72. United States International Trade Commission, *Renewable Energy and Related Services: Recent Developments* (Investigation No. 332-534, August 2013). P. 2-19. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 10. Camilla Prawitz & Magnus Rentzhog, 'Making Green Trade Happen – Environmental Goods and Indispensable Services' (The National Board of Trade 2014). P. 17.
73. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 10.
74. Ibid. P. 11. Tilak Doshi, 'Sector Study on Environmental Services: Renewable Energy' (APEC Policy Support Unit 2017). P. 29.
75. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 27.
76. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 56.
77. Tilak Doshi, 'Sector Study on Environmental Services: Renewable Energy' (APEC Policy Support Unit 2017). P. 6.
78. OECD, 'Managing Request-offer Negotiations under the GATS: the case of energy services' (TD/TC/WP(2003)24/FINAL). P. 15.

labor and immigration policies, barriers to trade in services under this mode are manifold.[79]

8.3.3.4. Access to Capital Markets and the Transfer of Funds

Access to capital markets, and access to finance more broadly, is also of great importance for flows of FDI as reduced access to finance will result in a lower capacity to invest.[80] In addition, the cost of capital may be lower in open capital markets, which can contribute significantly to a competitive LCOE.[81] Currently, Art. 9 ECT addresses access to capital markets: 'Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector in the Areas of those other Contracting Parties' on a NT or MFN basis, whichever is more favorable. The article does not preclude measures for prudential reasons, including measures designed to safeguard the stability of financial systems.

In addition to the provision of access to capital markets, the transfer of funds provision of the ECT can also contribute to facilitating flows of capital into and out of contracting parties. Nevertheless, the provisions concerning access to capital markets and the transfer of funds should reflect that they may relate more closely to Foreign Portfolio Investment (FPI) than FDI, although FDI of course also requires capital. The more liquid nature of FPI can lead to financial problems, in particular in developing countries. This is evidenced by recent events in Argentina.[82]

8.3.3.5. Key Personnel

On the basis of Art. 11 ECT, host States shall examine, 'in good faith', requests by investors concerning the temporary entrance and stay of key personnel

79. Jehan Sauvage & Christina Timiliotis, 'Trade in Services Related to the Environment' (OECD, 2017). P. 11. Camilla Prawitz & Magnus Rentzhog, 'Making Green Trade Happen – Environmental Goods and Indispensable Services' (The National Board of Trade 2014). P. 17.
80. Boris Ricken & George Malcotsis, *The Competitive Advantage of Regions and Nations – Technology Transfer through Foreign Direct Investment* (Gower 2011). P. 47.
81. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (Geneva, 2008). P. 41.
82. See for example: Marcos Brindicci, 'The IMF could push Argentina from a currency crisis into a debt crisis' (Business Insider, 2018). <http://www.businessinsider.com/the-imf-could-push-argentina-from-a-currency-crisis-into-a-debt-crisis-2018-5?international=true&r=US&IR=T> accessed on 23/05/2018.

into the territory of the host State. Most often, this provision is considered in relation to senior management of a company.[83] However, in the RES sector it may concern a specific group of employees that are of critical importance for the proper construction and operation of a RES project: engineers. Establishing a local presence or relying on foreign personnel 'are the predominant modes of [services] supply as the assembly and installation work often requires a physical presence at the customers site.'[84] Thus, a proper provision concerning 'key personnel' can contribute to rendering RES services in an economically efficient manner.

At present, Art. 11 ECT already covers key personnel employed by an investor engaged in activities related to 'key technical services.'[85] Major shortcoming of this provision is, however, that it subjects the entrance of services to national law. As said, key personnel provisions and trade in services in Mode 4 is highly controversial as it may relate to immigration and labor policy.

Nevertheless, a positive list approach could be adopted, which allows States to list commitments in a clear manner. Also, commitments could be made conditional (such as the establishment of a commercial presence and extending benefits to intra-corporate transferees).

8.4. Conclusion

At present it seems that the modernization process of the ECT will primarily consist of redefining the standards of investment protection in light of current trends. Given the significant amount of inconsistent ECT awards, this is in itself a welcome development. More recent IIA's often contain more textual guidance in comparison to comparable standards which in the past remained largely undefined. Nevertheless, in practice this also often leads to a lower level of investment protection. Controversial topics, such as the protection of legitimate expectation, are sometimes abandoned while in the RES sector the protection

83. Marie-France Houde, Akshay Kolse-Patil & Sébastien Miroudot, 'The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements' (OECD Trade Policy Working Paper No. 55, 2007). P. 16.
84. Tilak Doshi, *Sector Study on Environmental Services: Renewable Energy* (APEC Policy Support Unit, 2017). P. 6.
85. See also: Article 6(3), Canada Model BIT, 2004:
"Subject to its laws, regulations and policies relating to the entry of aliens, each Party shall grant temporary entry to nationals of the other Party, employed by an investor of the other Party, who seeks to render services to an investment of that investor in the territory of the Party, in a capacity that is managerial or executive or requires specialized knowledge."

of legitimate expectations plays a crucial role in providing effective protection to investors. Therefore, the ECT contracting parties could consider including specific investment protection standards that only apply with regards to RES investors and are aimed at addressing specific concerns of RES investors, such as the stability of regulatory and financial support. This way, RES investments can receive effective investment protection while a high level of investment protection does not have to be extended to non-RES energy investors whose economic activities might have to be phased out.

Devoting more attention to the investment promotion provisions of Part III of the ECT may unlock a significant potential to more actively facilitate RES investments. Contrary to the passive investment protection standards, active investment promotion commitments may have a more significant effect on FDI.[86] Likewise since most IIA's do not contain investment promotion provisions, States that do include such provisions in their IIA's may obtain a comparative advantage.[87] It has been said that 'the granting of investment protection increasingly becomes a common place' which means that 'countries could distinguish themselves through additional active investment promotion measures.'[88] In addition, investment promotion and facilitation can be an effective and relatively simple tool to stimulate flows of FDI.[89]

86. UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (Geneva, 2008). P. 62.
87. Ibid. P. 63.
88. Id.
89. Energy Charter Secretariat, 'The Energy Charter Investment Facilitation Toolbox' (Brussels, 2017). P. 2.

CHAPTER 9.

Legal Tools Available to Modernize the Energy Charter Treaty

9. LEGAL TOOLS AVAILABLE TO MODERNIZE THE ENERGY CHARTER TREATY

In the preceding chapters it was argued that the ECT should be changed in order to more effectively facilitate RES investments.[1] These changes concern both investment promotion and protection. Concerning investment promotion, the main complaint is that the ECT currently does not contain any binding commitments. Since these will have to be introduced, formal steps have to be taken by changing or supplementing the existing treaty norms. However, with regards to investment protection the contracting parties can take less far reaching steps that may yield the desired result. Therefore, this chapter is divided into two parts that both contain different legal tools that the ECT contracting parties may resort to. Chapter 9.1 will discuss the amendment procedure of the ECT as well as the Energy Charter Protocol option. These tools may be used to amend (amendment procedure only), or complement, supplement, extend, or amplify (amendment and Energy Charter Protocol) the legal regime of the ECT. Chapter 9.2 will subsequently discuss less far reaching tools that could be used to clarify the content of existing rules without changing them. As will be discussed, these tools may be suitable to address some of the concerns, in particular with regards to the lack of consistency in the interpretation and application of the relevant norms concerning investment protection, but they obviously have their limits as they cannot change the rules.

9.1. CHANGING OR SUPPLEMENTING THE SUBSTANTIVE RULES

This section will explore the legal tools that are available to ECT contracting parties to alter the rules of the ECT legal framework.

9.1.1. Amending the ECT

The obvious manner in which to change the ECT would be by amending relevant provisions. Particularly for the long-term, this could be a manner to modernize the treaty and to bring it in line with contemporary investment policy tendencies, especially where it concerns the investment protection provisions, while at the same time enhancing the investment promotion and liberalization commitments.

1. This chapter is based on a part of the following article: Cees Verburg, 'Modernizing the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement [2019] 20(2-3) Journal of World Investment & Trade 425.

For the short term, however, it might not necessarily yield the desired results since amending the treaty might be relatively difficult. As becomes clear from Art. 36(1)(a) ECT, amending the treaty requires unanimity of the contracting parties that are present and voting at the Energy Charter Conference.[2] Furthermore, once adopted, amendments will only affect the relations between the contracting parties that subsequently ratify the amendments.[3] In the past, the ECT has been successfully amended once. In 1998 the Trade Amendment was concluded although it only entered into force in 2010. This demonstrates the slow pace of the procedure. In particular since the Trade Amendment was relatively modest in ambition since its main purpose was to update the ECT's trade regime with the rules and practices of the WTO.[4]

9.1.2. Energy Charter Protocol

The second available tool would be to conclude an Energy Charter Protocol, which is defined in Art. 1(13)(a) ECT as:

> "a treaty, the negotiation of which is authorized and the text of which is adopted by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of co-operation pursuant to Title III of the Charter."

This option could thus be utilized to 'complement, supplement, extend or amplify' the provisions of the ECT. In that regard, it might be particularly suitable where it concerns commitments regarding investment promotion since they are currently largely absent from the treaty.

However, where it concerns investment protection, this option might be more complicated. In particular when any new rules would affect the level of investment protection, for example by lowering it, or affect the available ISDS mechanism. This is due to the presence of Art. 16 ECT, which allows investors to rely on those provisions most favorable to them in cases where ECT contracting parties have

2. Catalin Gabriel Stanescu, 'Article 36 – Voting' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). Pp. 439-440.
3. Article 42, the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
4. Cees Verburg, 'Modernizing the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement [2019] 20(2-3) Journal of World Investment & Trade 425. P. 445.

adopted a prior or subsequent international agreement dealing with investment protection or dispute settlement. Currently, Art. 16 explicitly disables any *lex priori* or *lex posterior* rule in such a case, which means that investors may still resort to the existing rules of the ECT and thereby circumvent the rules agreed upon in the Protocol. It goes without saying that the ECT contracting parties can remove Art. 16 ECT from the treaty through an amendment, although that option comes with the difficulties laid down above.

A second issue that arises when concluding a Protocol relates to the consent-based nature of the Protocol, meaning that only those ECT parties that agree to its terms will be affected by it and those parties that do not submit to it will not be affected.[5] Although the same situation occurs when the amendment procedure is utilized, in particular when the amendment is subsequently not ratified by all ECT contracting parties, this may be undesirable as a situation may arise in which diverging sets of rights and obligations exist amongst the ECT constituency. This might be undesirable given the fact that the ECT was concluded as a comprehensive package deal that did not allow for reservations.[6]

9.1.3. *Inter se* Modification of the ECT

In light of the difficulties associated with amending the ECT or concluding a Protocol, particularly in light of Art. 16 ECT, an alternative manner in which the ECT can be brought in line with contemporary policy tendencies between like-minded States would be by *inter se* modification on the basis of Art. 41 VCLT.[7] This tool has been described as an 'essential technique, and necessary safety valve, for the adjustment of treaties to the dynamic needs of international society.'[8]

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5. Article 33(5), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
6. Ibid. Article 46. Decision of the Energy Charter Conference, Modernisation of the Energy Charter Treaty (CCDEC 2017 23 STR, 28 November 2017). P. 1.
7. Article 41, Vienna Convention on the Law of Treaties (adopted 23/05/1969, entered into force 27/01/1980). On the basis of VCLT, art 41 '[t]wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves' if there is no prohibition in the treaty, the modification does not affect the rights and obligations of other parties to the treaty and it 'does not relate to a provision, derogation of which is incompatible with the effective execution of the object and purpose of the treaty as a whole.' These conditions are cumulative, see Anne Rigaux & Denys Simon, 'Article 41 Agreements to Modify Multilateral Treaties between Certain of the Parties Only' in Olivier Corten *et al* (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011). P. 1002.
8. Malgosia Fitzmaurice & Panos Merkouris, 'Re-Shaping Treaties While Balancing Interests of Stability and Change: Critical Issues in the Amendment/Modification/Revision of

In light of the contemporary controversies surrounding the content of investment treaties, in particular where it concerns investment protection, the modification procedure can be used as a 'safety valve.'[9] In this regard, one can think of providing the provisions regarding investment protection with more clarity, even if it would lower the level of investment protection or narrow the scope by modifying the definitions contained in Art. 1.

Since the ECT does not contain a prohibition on the modification of its content and one could argue that the obligations arising under Part III of the treaty are reciprocal rather than absolute, certain ECT contracting parties could modify ECT obligations between themselves without affecting those rights of ECT contracting parties that are not involved in the process.[10]

Admittedly, this approach would not be ideal since a situation would emerge where different sets of rights and obligations amongst the ECT constituency would exist. Nevertheless, it would allow like-minded States to modify the ECT in accordance with their needs while at the same time pushing for a critical mass within the Energy Charter Conference that could lead to more structural reforms in the long-term.

9.2. CLARIFYING THE CONTENT OF EXISTING RULES

Through the tools that have been discussed thus far, the ECT contracting parties can change the rules that apply in the international legal framework that is created by the ECT. The parties could, however, also resort to instruments of soft law that may provide more clarity on the content of existing norms without changing their content. This could influence decisions rendered by tribunals operating under the current rules of the ECT, although there are certainly limitations. After all, the duty of any ECT tribunal is to 'apply the law as it finds it, not to make it.'[11] Mayor

Treaties' [2018] 20(1) Austrian Review of International and European Law 41. P. 44.

9. Ibid. Pp. 44-45.
10. Anne Rigaux & Denys Simon, 'Article 41 Agreements to Modify Multilateral Treaties between Certain of the Parties Only' in Olivier Corten *et al* (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011). Pp. 1003-1005.
11. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, I.C.J. Reports 1966, p. 6. Para. 89. See also: Award, *Saudi Arabia v. Arabian American Oil Company (Aramco),* 23 August 1958, I.L.R. 27, 1963, p. 117. P. 148. Decision of 21 October 1994, *Boundary Dispute Between Argentina and Chile Concerning the Frontier Line Between Boundary Post 62 and Mount Fitzroy (Laguna Del Desierto case)*, Reports of International Arbitral Awards, vol. XXII, p. 3. Para. 75. Malcolm N. Shaw, *International Law* (Cambridge University Press 2008). P. 934.

benefits of these tools are that they may be less time consuming and politically less difficult, because ratifications are not required.

9.2.1. Energy Charter Declaration

The adoption of an Energy Charter Declaration would be the first example. This is defined in Art. 1(13)(b) ECT as a 'non-binding instrument, the negotiation of which is authorized and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties complement or supplement the provisions of this Treaty.' For purposes of treaty interpretation, such a declaration may constitute an authoritative subsequent agreement regarding the interpretation of ECT provisions in the sense of Art. 31(3)(a) VCLT or it may be considered as 'subsequent practice in the application of the treaty' under Art. 31(3)(b) VCLT. Subsequently, through the rules of treaty interpretation it may influence in the interpretation of ECT norms in dispute settlement procedures. Thus, even though – contrary to other IIA's – the ECT does not contain a mechanism that allows for interpretations by the contracting parties that are binding upon tribunals, ECT contracting parties may resort to this soft law instrument that can yield comparable results.[12] Nevertheless, to increase the chances that such declarations will have the desired effect, two issues need to be kept in mind.

Firstly, in order to enhance the authority of the declaration it should be adopted by unanimity, since all parties have than explicitly agreed to the declaration while, if it would be adopted by consensus, the agreement would merely be implicit.[13]

Secondly, the declaration should genuinely clarify the content of the existing rules of the treaty and not be a disguised amendment since this would undermine the authority of such declarations.[14] This point will be illustrated by reference to two potential examples:

12. See for example: Article 1131(2), North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994).
13. ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10/Add.1. P. 559.
14. A similar point was made by the WTO Appellate Body in relation to the authority of WTO members to adopt interpretations of the WTO Agreements under Article IX:2 of the WTO Agreement: Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 DSU by Ecuador,* WT/DS27/AB/RW2/ECU, 2008. Para. 383 and Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA, 2008. Para. 383. Isabelle van Damme, 'Treaty Interpretation by the WTO Appellate Body' [2010] 21

Firstly, the ECT contracting parties may attempt to tie the FET standard of the ECT to the international minimum standard of customary international law, as happened under NAFTA, although this should be seen as a disguised amendment. This can most clearly be illustrated by reference to the ruling in the *Liman Caspian Oil v. Kazakhstan* case, where the tribunal held:

> '[…] the Tribunal considers that the purpose of ECT Article 10(1), second sentence, is to provide a protection which goes beyond the minimum standard of treatment under international law. The ECT was intended to go further than simply reiterating the protection offered by the latter. In this respect, ECT Article 10(1), second sentence, differs from NAFTA Article 1105 (in its interpretation given by the Free Trade Commission on 31 July 2001) which contains an express reference to international law. Therefore, when assessing Respondent's actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT.'[15]

In light of this statement, the gist of which was recently repeated in the *Antin v. Spain* and *RREEF v. Spain* cases, a claim that the FET standard of the ECT is supposed to provide for no more than the international minimum standard is unpersuasive and might be perceived as a disguised amendment.[16] As experience under NAFTA shows, this may undermine the impact of such a declaration, in particular in relation to ongoing cases.[17] Since States play a double role in this regard, as they are both masters of the treaty as well as (potential or actual) respondent in investment arbitration, tribunals may view interpretations by contracting parties that are perceived as disguised amendment with skepticism 'because of concerns about ensuring the equality of arms' between investors and States.[18]

European Journal International Law 605. P. 612.

15. Excerpts of the Award, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, 2010. Para. 263.
16. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 530. Decision on Responsibility and on the Principles of Quantum, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2018. Paras. 258 & 263.
17. Award in Respect of Damages, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, 2002. Para. 47.
18. Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' [2010] 104 American Journal of International Law 179. Pp. 179-180 & 212-214.

A potentially more successful example would be a declaration that mirrors the content of interpretive annexes that are nowadays often attached to IIA's which contain more guidance on the concept of indirect expropriation.[19] In the *Philip Morris v. Uruguay* case, based on the Uruguay-Switzerland BIT which contains an expropriation provision comparable to Art. 13 ECT, the tribunal explicitly referred to such interpretive annexes despite the fact that the applicable treaty

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Margie-Lys Jaime, 'Relying upon Parties' Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements' [2014] 46 Georgetown Journal of International Law 261. P. 292. Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in Malgosia Fitzmaurice *et al* (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties – 30 Years on* (Martinus Nijhoff Publishers 2010). Pp. 147-148. August Reinisch, 'The Interpretation of International Investment Agreements' in Marc Bungenberg *et al* (eds.), *International Investment Law – A Handbook* (C.H. Beck 2015). Pp. 405-407. Michael Waibel, 'International Investment Law and Treaty Interpretation – Problems, Particularities and Possible Trends' in Rainer Hofmann *et al* (eds.), *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Nomos 2011). Pp. 47-48.

19. Anne K. Hoffmann, 'Indirect Expropriation' in August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008). Pp. 166-167. Annex 8-A, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Annex 4 Expropriation, EU-Vietnam Investment Protection Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending). Annex B.13(1), Canada Model BIT 2004 and Annex B, US Model BIT 2012 contain similar clauses and have made it into the following BIT's: Annex I, Agreement Between the Government of Canada and the Government of the Hong Kong Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments (Canada-Hong Kong) (adopted 10/02/2016, entered into force 06/09/2016). Annex B, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (Canada-Latvia) (adopted 05/05/2009, entered into force 24/11/2011). Annex B.10, Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada-Mali) (adopted 28/11/2014, entered into force 28/11/2014). Annex B.13(1), Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (Canada-Peru) (adopted 14/11/2006, entered into force 20/06/2007). Annex B.10, Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments (Canada-Senegal) (adopted 27/11/2014, entered into force 05/08/2016). Annex B.10, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments (Canada-Serbia) (adopted 01/09/2014, entered into force 27/04/2015). Annex A, Agreement Between Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada-Slovakia) (adopted 20/07/2010, entered into force 14/03/2012). Annex B, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay) (adopted 04/11/2005, entered into force 01/11/2006). Annex B, Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda) (adopted 19/02/2008, entered into force 01/01/2012).

did not contain such an annex.[20] Although neither Switzerland nor Uruguay was involved in the treaties that the tribunal referred to, this was immaterial as the tribunal was of the opinion that the annexes reflected the position under general international law.[21] This demonstrates that an Energy Charter Declaration which reflects the content of such interpretive annexes is more likely to be accepted by tribunals as an elucidation of the concept of indirect expropriation, rather than an apparent amendment.

Therefore, Energy Charter Declarations that contain more guidance on the content of existing ECT provisions can be utilized to provide more clarity of existing norms and thereby influence ECT dispute settlement, provided that they are adopted by unanimity and do not attempt to amend the treaty.

9.2.2. Non-Disputing Parties as *Amicus Curiae*

Another way in which ECT contracting parties can attempt to provide clarity on the content of existing treaty norms is by strengthening the participation of contracting parties in ongoing disputes where the ECT is being interpreted and applied.

Contrary to ECT practice, parties to NAFTA have for example often participated in ongoing disputes, even if they were not involved in the case as respondent. Non-disputing NAFTA parties have done so on the basis of Art. 1128 NAFTA, which allows a NAFTA party to 'make submissions to a tribunal on a question of interpretation of this agreement.'[22] This provision 'provides an official channel through which the parties can agree upon such interpretation, without taking position on the facts related to the dispute before the tribunal.'[23] For the purposes of treaty interpretation, such submissions may constitute either a 'subsequent agreement' under Art. 31(3)(a) VCLT or 'subsequent practice' under Art. 31(3)(b) VCLT, which shall be taken into account by a tribunal when interpreting the

20. Award, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v the Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, 2016. Para. 300. See also Article 5(1), Agreement Between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (Switzerland-Uruguay) (adopted 07/10/1988, entered into force 22/04/1991).
21. Award, *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v the Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, 2016. Para. 301.
22. Article 1128, North American Free Trade Agreement (United States-Canada-Mexico) (adopted 17/12/1992, entered into force 01/01/1994).
23. Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart 2016). P. 193.

treaty.[24] A review of NAFTA practice shows that non-disputing States tend to submit restrictive interpretations, which – if endorsed by all treaty parties – are often taken into account by tribunals although this acceptance is not as unequivocal as when binding interpretations, for example under Art. 1131 NAFTA, are issued.[25]

It has been said that the involvement of third parties can have a material impact on the outcome of legal proceedings and it constitutes accepted practice under the procedural rules of various international courts.[26] More specifically in the context of investment arbitration, the 2014 UNCITRAL Transparency Rules allow for submissions by non-disputing parties to the treaty.[27] Besides the NAFTA provision, referred to above, non-disputing parties have a right to make submissions on the interpretation of the treaty under the CPTPP, Dominican Republic – Central America – United States Free Trade Agreement, and the Canadian and US Model BIT's.[28] Comparable provisions have also been

24. Id. Meg Kinnear, Andrea Bjorklund & John Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006-2009) 1128-4c. Award on Jurisdiction, *The Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, 2008. Paras. 186-189.
25. Gabrielle Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?' in Laurence Boisson de Chazournes *et al* (eds.), *Diplomatic and Judicial Means of Dispute Settlement* (Brill 2012). P. 314. Wolfgang Alschner, 'The Return of the Home State and the Rise of "Embedded" Investor-State Arbitration' in Shaheeza Lalani *et al* (eds.), *The Role of the State in Investor-State Arbitration* (Brill 2015). P. 311. Andrea Menaker, 'Treatment of Non-Disputing State Party Views in Investor-State Arbitrations' in Arthur Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2008* (Brill 2009). Pp. 68-73.
26. See Articles 10 & 17, Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization) (adopted 15/04/1994, entered into force 01/01/1995). Article 23, Statute of the Court of Justice of the European Union [2012] OJ C83/210. Article 96, Consolidated Version of the Rules of Procedure of the Court of Justice of 25 September 2012 [2012] OJ L265. See also Marc Busch & Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement' [2006] 58(3) World Politics 446. P. 447. Clifford Carrubba, Matthew Gabel & Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' [2008] 102 American Political Science Review 435. Pp. 449-450. Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation [2011] 29 Berkeley Journal of International Law 200. P. 217. Katia Fach Gómez, 'Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest' [2012] 35 Fordham International Law Journal 510. P. 545.
27. Article 5, UNCITRAL Transparency Rules, 2014. Claudia Reith, 'The New UNCITRAL Rules on Transparency 2014: Significant Breakthrough or a Regime Full of Empty Formula?' in Marianne Roth *et al* (eds.), *Yearbook on International Arbitration*, vol 4 (Intersentia 2015). Pp. 136-137.
28. Article 28, US Model BIT, 2012. Article 35, Canada Model BIT, 2004, Article 9.23,

accepted by the EU in its IIA's with Canada, Singapore, and Vietnam.[29] Although textual differences exist amongst these provisions, they all have in common that the right of non-disputing parties to make submissions is restricted to issues regarding the interpretation of the agreement only.

9.2.2.1. Applicable Arbitration Rules

Although the ECT currently does not provide contracting parties with an explicit right to make submissions regarding the interpretation of the treaty, the applicable arbitration rules in investor-State disputes may fill this gap.

At present, there are examples from ECT practice where non-disputing parties have made submissions to tribunals although these tribunals currently possess discretion whether or not to admit such submissions and, in doing so, conditions may be imposed on their scope and costs may even be levied on the non-disputing parties.

For instance, in *Electrabel v. Hungary* and *AES v. Hungary*, the European Commission participated in the proceedings as *amicus curiae*.[30] Both tribunals operated under the ICSID arbitration rules and they allowed the Commissions intervention on the basis of Rule 37(2) of the ICSID arbitration rules.[31] The *Electrabel* tribunal laid down certain parameters for the scope of the Commissions submission which went beyond mere issues regarding the interpretation of the ECT.[32] In the *RREEF v. Spain* and *Eiser v. Spain* cases, ICSID tribunals acted differently. In *RREEF* the tribunal twice rejected the attempts from the Commission to intervene while in the *Eiser* case the submission was made contingent on the Commissions willingness to pay 'the additional costs of legal

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 08/03/2018, entered into force 30/12/2018). Article 10.20, Dominican Republic – Central America – United States Free Trade Agreement (adopted 05/08/2004, entered into force 01/01/2009).

29. Article 8.38, Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending). Article 3.17, EU-Singapore Investment Protection Agreement (adopted 19/10/2018, entrance into force still pending). Article 3.51(2), EU-Vietnam Investment Protection Agreement (adopted 30/06/2019, entrance into force still pending).
30. Procedural Order No. 4, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2009. Award, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, 2010. Paras 3.18-3.22.
31. Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press 2009). P. 704.
32. Procedural Order No. 4, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, 2009. Paras. 24-26.

presentation reasonably incurred by the parties in responding to' its submission.[33] ECT practice under the ICSID arbitration rules is thus not consistent.

In the *Charanne v. Spain* case, where the tribunal operated on basis of the 2010 arbitration rules of the Stockholm Chamber of Commerce (SCC), the Commission was allowed to make *amicus curiae* submissions although it was not given access to the case files nor was it allowed to attend the hearings.[34] The SCC has since updated its arbitration rules and the 2017 version of it contain a right, subject to certain conditions, for non-disputing treaty parties to make submissions 'on issues of treaty interpretation' in a separate appendix for investment treaty disputes.[35] This innovative provision has not yet been relied upon in practice.

The 2013 UNCITRAL arbitration rules incorporate the UNCITRAL Transparency Rules by reference and thus provide for a right for non-disputing parties to make submissions 'on issues of treaty interpretation' by reference.[36] In case older versions of the UNCITRAL arbitration rules apply, the general procedural power of UNCITRAL tribunals will have to be exerted.[37] Practice of the IUSCT, which operates under the 1976 UNCITRAL arbitration rules, demonstrates that third-party submissions is accepted under these rules.[38]

Nevertheless, an explicit endorsement by the Energy Charter Conference of this right would be desirable. Under the NAFTA for example, the contracting parties – acting through the NAFTA Free Trade Commission – explicitly acknowledged through a statement that non-disputing parties, including parties other than non-

33. Decision on Jurisdiction, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, 2016. Paras. 16-32. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 65.
34. Unofficial Translation of the Final Award, *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, 2016. Paras. 16, 49-60.
35. Article 4, Appendix III, SCC Arbitration Rules, 2017.
36. Article 1(4), UNCITRAL Arbitration Rules, 2013. Article 5, UNCITRAL Transparency Rules, 2014.
37. Article 15(1), UNCITRAL Arbitration Rules, 1976. Article 17(1), UNCITRAL Arbitration Rules, 2010. See also: David Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2013). Pp. 30-31, 39-41. Clyde Croft, Christopher Kee & Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press 2013). Pp. 176, 192-193.
38. *United States v. Iran*, No. A17, Decision No. Dec. 37-A17-FT, 1985, 8 Iran United States Claims Tribunal Reports 1987. P. 191. David Caron & Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press 2013). P. 40.

disputing NAFTA parties, may act as *amicus curiae*.[39] This statement sets certain criteria that have to be met by *amicus curiae* submissions. From subsequent NAFTA cases, where tribunals had to decide on the participation of *amicus curiae,* the importance of such a statement becomes apparent.[40]

Therefore, third party participation is possible in ECT disputes, a possibility that is explicitly acknowledged in the 2017 SCC arbitration rules and the 2013 UNCITRAL arbitration rules. The ICSID arbitration rules also allow for this possibility, although the tribunal has the discretion to decide on this issue. Under the 1976 and 2010 UNCITRAL arbitration rules the general procedural powers of the tribunal will have to be exercised. Therefore, a declaration of the Energy Charter Conference that reflects the content Appendix III of the 2017 SCC arbitration rules would strengthen the position of non-disputing ECT parties. In a similar vein, developments outside of the ECT context could also strengthen the position of non-disputing ECT parties. For instance, if more ECT contracting parties sign and ratify the 2014 Mauritius Convention on Transparency, the UNCITRAL Transparency Rules could be made applicable in ECT disputes.

9.2.2.2. Transparency in Dispute Settlement Procedures

A strengthened position of non-disputing ECT parties would be futile, however, in the absence of enhanced transparency amongst ECT contracting parties where it concerns pending ECT disputes. The existence has to be known amongst contacting parties before one can participate and, relatedly, relevant documents concerning pending procedures, such as parties' submissions and decisions rendered by tribunals should become available. After all, how can a State participate in ongoing ECT disputes if it is not aware of such disputes, let alone make meaningful submissions if the contested issues are unknown.[41] In that regard, the Energy Charter Secretariat could oversee the distribution of documents and other relevant information in a comparable manner to the WTO

39. Statement of the Free Trade Commission on Non-Disputing Party Participation <www.sice.oas.org/TPD/NAFTA/Commission/Nondispute_e.pdf> accessed 06/03/2017.
40. Decision on Application and Submission by Quechan Indian Nation, *Glamis Gold, Ltd v. United States of America*, UNCITRAL, 2005. Paras. 9-13. Procedural Order No. 2 on the Participation of a Non-Disputing Party, *Apotex Inc v. the Government of the United States of America*, UNCITRAL, 2011. Paras. 15-35. Procedural Order No. 4, *Eli Lilly and Company v. the Government of Canada*, ICSID Case No. UNCT/14/2, 2016. Paras. A-B.
41. In *Glamis Gold*, the non-disputing parties stated 'that it would be difficult to submit meaningful submissions without first examining the Parties' memorial and counter-memorial.' See Procedural Order No. 6, *Glamis Gold Ltd v. the United States of America,* UNCITRAL, 2005. Para. 11.

Secretariat. In the alternative, if more ECT contracting parties ratify the Mauritius Convention, the Secretary General of the United Nations or an institution named by UNCITRAL will act as repository.[42] Either way, it is encouraging to see that transparency is on the approved list of topics for the ECT's modernization process.[43]

9.3. Conclusion

There are various legal avenues available that can be used by ECT contracting parties to address the shortcomings in the current legal framework. The appropriate tool to be used depends on the nature of the proposed change. For example, where it concerns investment promotion new rules will have to be established that deviate from the existing rules. Therefore, amending the current ECT or supplementing it with a binding treaty in the form of an Energy Charter Protocol will be necessary. The same holds true where it concerns some of the issues relating to investment protection; if the contracting parties want to – for example – lower the level of investment protection offered by the FET standard or they want to narrow the scope of the investment provisions by changing the definitions of 'investor' and/or 'investment', formal steps will have to be taken. These latter changes could also be implemented by a group of like-minded States through the modification procedure contained in Art. 41 VCLT, although the formalities of the said provision have to be complied with.

If the ECT contracting parties want to clarify the existing rules of the ECT without changing them, other tools may be available. In that regard, one could think of the unanimous adoption of an Energy Charter Declaration or even the participation by non-disputing parties in ongoing dispute settlement cases.

42. Article 8, UNCITRAL Transparency Rules, 2014.
43. Energy Charter Secretariat, Approved Topics for the Modernisation of the Energy Charter Treaty (29 November 2018) <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> accessed on 17/12/2018.

CHAPTER 10.

Recommendations and Conclusion

10. RECOMMENDATIONS AND CONCLUSION

When the ECT was negotiated and concluded, it was primarily expected to protect investments from Western companies in unstable economies in the East. At the time, most had probably envisioned that it would concern investments in conventional energy sources, such as oil and gas. Nevertheless, the ECT is currently primarily invoked in relations between Member States of the EU and not predominantly in the conventional energy sector but rather primarily in the RES sector.

This means that the ECT currently caters for a need, even though this was not the main goal at the time of conclusion: applying an existing legal framework to an unanticipated factual context may be easier and save a significant amount of time in comparison to where a legal framework has to be established. However, the mere fact that the ECT currently does apply to RES investments does not necessarily mean that it does so effectively.

At present, RES ECT disputes arise primarily in the relations between EU Member States and barely involve non-EU countries and/or their investors. This may be because of the liberal economic regime applying within the EU that facilitates cross-border economic activities by guaranteeing free movement of capital, goods, persons, and the freedom of establishment. Investment promotion is then provided for by EU law while the ECT primarily remains an appealing legal instrument for purposes of investment protection.

Notwithstanding the fact that the ECT currently applies to RES, there is nevertheless ample room for improvement. This chapter will answer the main research question, which is repeated in full:

> "What changes to the legal framework of the ECT, regarding investment promotion and protection, have to be made to facilitate investments in renewable energy sources?"

This question will be answered in light of the economic theories discussed in chapter 2 and the practical considerations regarding the RES sector as discussed in chapter 3. This means that:

· On the basis of liberal economic theory, trade and investment distorting measures may undermine economic efficiency by favoring domestic goods and services suppliers over foreign competitors. Economics of scale may subsequently not be fully exploited which results in higher prices than otherwise necessary.

· From a micro economic perspective, investors may have various motives to invest abroad, related to potential higher rates of return, risk diversification, avoiding trade barriers, meet increased demand on foreign markets, and/or internalize activities in their own supply chain. However, risks associated with investing in foreign jurisdictions are also an important issue that is taken into account by potential investors. A major component of this is the political and regulatory risk. Recent experience in the RES sector demonstrates that the lack of a stable regulatory framework governing RES can undermine the economic viability of RES investments.

· This latter point may directly affect the cost of capital, which plays a major role in the LCOE of a RES project. Therefore, reducing perceived risks – whether they are of a political, regulatory, technical, or any other nature – can contribute to the competitiveness of RES.

· Excessive transaction costs can prevent desirable economic exchanges from taking place. Therefore, measures that may reduce transaction costs should be favored and measures that cause them should be avoided.

· A diverse pool of investors is currently active in the RES sector. Nevertheless, the sector is very much internationally oriented, in particular when one takes into account not only the stage of project development, but also the value chain of RES generation equipment. This means that even a project that is completely domestically financed is likely to benefit from investment and trade liberalization.

· Investment and trade in the RES are closely related. As said, generation equipment is produced through GVC's, services and goods are often sold in tandem, international OEM's often render relevant services through the establishment of a commercial

presence in the host State while OEM's also regularly participate in large projects as equity partner.

With these general observations in mind, I will now turn to recommendations that could be implemented with the purpose to facilitate RES investments. In line with the previous chapters, I will discuss investment protection and promotion in turn.

10.1. INVESTMENT PROTECTION

The ECT's investment chapter currently primarily provides for post-establishment investment protection. It has been said that the ECT is aimed at strengthening the rule of law in global energy matters.[1] In comparison to more recent IIA's, the ECT prescribes a relatively high level of investment protection: the ECT contains a relatively high number of investment protection standards several of which are currently not necessarily included in new IIA's, such as the non-impairment obligation, the umbrella clause, and the effective means clause. In addition, even if certain provisions are retained in more recent IIA's, such as the FET standard, they are by no means identical to the ECT's FET standard. In comparison to the ECT, newer treaties often describe and clarify the content of standards of investment protection more clearly, which *de facto,* may lead to a lower level of investment protection. This often holds true, for example, with regard to the FET standard, NT and MFN obligations, MCPS, and (indirect) expropriation.

Also, more recent IIA's in general contain many more clarifications, exceptions, and derogations than older IIA's. All of this is done in order to safeguard the host States' right to regulate its domestic affairs. As currently evidenced by the list of topics approved for modernization by the Energy Charter Conference, many investment protection standards will be modernized.[2] These include: FET, MFN, MCPS, the definition of indirect expropriation, and the umbrella clause. Furthermore, certain topics currently not explicitly addressed in the text of the ECT are also on the agenda, including the right to regulate and sustainable

1. Rafael Leal-Arcas, 'Introduction' in Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty* (Edward Elgar 2018). P. 1.
2. Energy Charter Secretariat, 'Approved Topics for the Modernisation of the Energy Charter Treaty' (29 November 2018) <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> accessed on 06/06/2019.

development and social corporate responsibility. In light of this and more recent IIA's, it seems that the modernization process will largely evolve around redefining standards of investment protection in a manner that considers the States' right to regulate.

Providing more clarity to the existing investment protection standards is, however, a most welcome development. As shown throughout this dissertation, many ECT provisions have given rise to seemingly inconsistent decisions, even in factually comparable cases. A lack of legal certainty under the ECT adversely affects all parties involved: investors might be unsure what is protected under the treaty while States may become hesitant in regulating their domestic affairs fearing that investors may invoke the ECT. If the ECT is really supposed to strengthen the rule of law in energy affairs, then the rule of law itself is probably one of the strongest arguments in favor of more legal certainty.[3] Since the ECT contracting parties are the masters of the treaty, it is advisable that they take the lead in more clearly defining the standards of investment protection. It is in fact a strategy that various States, including ECT contracting parties, have already adopted in practice by publishing new Model BIT's and negotiating and concluding IIA's that contain more clearly defined standards of investment protection. This new practice, as evidenced by new Model BIT's and IIA's, may be an appropriate starting point for a modernized ECT. After all, while recent IIA's may adopt approaches along comparable lines they are far from uniform.

10.1.1. Protecting RES Investments

In chapter 2, I established that the costs of capital are determined largely by reference to the risks associated with an investment. As shown by ECT RES investment disputes: the risk that financial support to RES projects is withdrawn or reduced is not just hypothetical. In most, if not all, ECT disputes concerning RES the protection of the investor's legitimate expectations is at the heart of the dispute. However, when looking at more recent IIA's, the frustration of the investors' legitimate expectations does not necessarily lead to a violation of the treaty. In that regard, it might sound counterintuitive to argue in favor of redefining investment protection standards if that would entail a lower level of investment protection as this may increase the cost of capital.

3. Cees Verburg, 'Modernizing the Energy Charter Treaty: An Opportunity to Enhance Legal Certainty in Investor-State Dispute Settlement [2019] 20(2-3) Journal of World Investment & Trade 425. P. 454.

However, in light of the inconsistent arbitral jurisprudence regarding the protection of legitmate expectations – including in ECT RES disputes – it may be comprehensable that some States might want to avoid explicit reference to it. In particular since a modernized ECT will not only apply to RES investors, but also to other investors in the energy sector whose economic activities will have to be scaled back if we want to meet the climate goals of the Paris Agreement. Therefore, it might be advisable that States consider the possibility of drafting standards of investment protection specifically targeted at RES investments. For example, the 2018 EU RES Directive devotes a specific provision to the financial stability of support schemes for RES from which inspiration can be drawn.[4] This can prevent situations as were seen in the Spanish RES sector where a support scheme was replaced with a fundamentally different support scheme.

An alternative approach would be to seek for guidance in ECT jurisprudence. In *Blusun v. Italy,* the tribunal proposed the following standard of review:

> 'In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime.'[5]

As stated by the tribunal itself, a proportionality test 'carries in-built limitations' and is 'determinate' while it is also a 'criterion which administrative law courts, and human rights courts, have become accustomed to apply to governmental action.'[6]

Besides providing for a provision on financial stability it may also be advisable to include a provision that foresees in stability with regard to priority dispatch as this will protect the fundamental characteristics of a RES support scheme as

4. Article 6(1), Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast) [2018] OJ L328/82.
5. Final Award, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, 2016. Para. 319(5).
6. Ibid. Para. 318.

identified by ECT tribunals. The combination of financial support and priority dispatch ensures that investors have a high level of certainty regarding the price of the product that they produce as well as the demand for it. Since it is this combination of features that enabled many RES investors to obtain financing for their investments, these are also the main elements that should be protected.[7]

Drafting provisions that exclusively apply to RES investments and reduce risks that may be specific for RES investments would be a way to, on the one hand, provide for an appropriate level of investment protection for RES investors while, on the other hand, avoiding that such provisions can be relied upon by non-RES investors in the energy sector.

10.2. INVESTMENT PROMOTION

At present, the ECT – like most other IIA's – primarily provides for post-establishment protection while the commitments under the treaty with regards to investment promotion are limited. It has nevertheless been questioned whether such treaties effectively contribute to increased flows of FDI.[8] However, this should not be surprising since, in theory, ECT contracting parties are under no obligation to admit foreign investors. Therefore, a State may sign and ratify the ECT and decide to admit virtually no foreign investors. After all, it is only once the host State has unilaterally decided to admit foreign investors that the obligations of the ECT become relevant. In such a situation, it can hardly be surprising that the effect of the IIA on flows of FDI is limited.

Therefore, in order for the ECT to effectively facilitate investments in RES, the contracting parties should work towards removing barriers to FDI that are at present lawful under the treaty. In addition to the general liberalization of FDI in the RES sector, there are also specific provisions currently in the ECT that could contribute to removing barriers to investment and trade in the RES sector that remain underdeveloped. This section will address them in turn.

7. Final Award, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, 2017. Para. 412. Award, *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 2018. Para. 560.
8. Jonathan Bonnitcha, Assessing the Impacts of Investment Treaties: Overview of the Evidence (IISD 2017). <https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf> accessed on 24/01/2019. Pp. 3-4.

10.2.1. Investment Liberalization

As was discussed in chapter 6.1, the liberalization of FDI by including so-called 'pre-establishment rights' was a heavily contested issue during the ECT negotiations. In the end, the parties settled on a compromise: no pre-establishment rights would be included in the ECT but the parties committed themselves to concluding a supplementary treaty.[9] This latter treaty would never be concluded.

Various approaches exist with regards to the making of investments. The most transparent approach is by extending the NT and MFN obligations to the pre-establishment phase of an investment. This means that, in principle, foreign investors should receive 'a right of entry on an equal footing with national investors.'[10] Subsequently, the negotiating parties can agree on exceptions to this general rule, for example by allowing for non-conforming measures. These non-conforming measures are to be incorporated into a schedule.[11] Thereby, the contracting parties can agree to the continued application of discriminatory legislation. This way, the exact extent to which foreign investors obtain market access simply becomes a matter of negotiations. In the end, the parties are then expected to reach an equilibrium that is satisfactory to all parties involved.

The pro-liberalization spirit of the agreement could subsequently be further entrenched by including a standstill clause, much akin to current Art. 10(6)(a) ECT albeit for the voluntary nature of that provision, which would preclude contracting parties from introducing new laws and regulations that violate the NT and MFN obligation. A benefit of this approach would be that it is quite transparent, which could reduce transaction costs: discriminatory legislation is in principle not allowed unless it is included in the schedule of non-conforming measures.

Currently, 'pre-investment' is on the list of approved topics for modernization.[12] Although it is not clear what is meant by 'pre-investment', it may relate to the

9. Article 10(4), the Energy Charter Treaty (adopted 17/12/1994, entered into force 16/04/1998).
10. August Reinisch, 'National Treatment' in Marc Bungenberg *et al* (eds.), *International Investment Law: A Handbook* (C.H. Beck 2015). P. 851.
11. Articles 8.15(1) & (2), Comprehensive Economic and Trade Agreement (European Union-Canada) (adopted 30/10/2016, entrance into force still pending).
12. Energy Charter Secretariat, 'Approved Topics for the Modernisation of the Energy Charter Treaty' (29 November 2018) <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-

liberalization of investments in a way that was previously attempted by the ECT contracting parties. Unfortunately however, the European Commission, which as representative of the EU in combination with its Member States, makes up a significant proportion of ECT contracting parties, has already indicated that it does not consider 'pre-investment' a priority in the modernization process.[13]

10.2.2. Trade Related Investment Measures

Another significant contribution that a modernized ECT could make to facilitate RES investments is by abolishing LCR's, which have been quite common in the RES sector. As discussed earlier in this dissertation, these LCR's can significantly affect the LCOE of RES since they can undermine economic efficiency, increase transaction costs, and impose additional risks to proposed projects which can result in higher cost of capital. At present, Art. 10(11) ECT merely prohibits the application of LCR's to investments 'existing at the time of such application.' However, since investments in RES are currently still largely regulatory driven, this provision is of little use if the RES support scheme contains the LCR: after all, the LCR was adopted before the investment even existed, which means that it is highly unlikely that it will be applied to an already existing investment. Therefore, the application of LCR's in the pre-establishment phase of an investment should also be prohibited. In addition, the scope of the TRIM's provision could be extended to include not only goods but also services, investors, and investments as the EUVFTA does.[14]

The current list of approved topics for modernization does not mention Art. 5 ECT and TRIM's. Therefore, it seems that this topic will not be discussed by the contracting parties.

energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> accessed on 06/06/2019.

13. Council of the European Union, 'Negotiating Directives for the Modernisation of the Energy Charter Treaty' (2019, 9305/19). P. 6. European Commission, 'Recommendation for a Council Decision Authorising the Entering Into Negotiations on the Modernization of the Energy Charter Treaty' (COM(2019) 231 final, 14/05/2019). P. 2. About 'pre-investment' the Recommendation states as follows: 'The EU recorded its reservation to avoid making pre-investment subject to dispute settlement. In general, the EU views that the reasons and circumstances that did not allow for a successful conclusion of a "Supplementary Treaty" in the past, remain. Against this backdrop, pre-investment is not a priority of the EU in this modernisation round which should focus on investment protection provisions.'
14. Article 7.4, EU-Vietnam Free Trade Agreement (European Union-Vietnam) (adopted 30/06/2019, entrance into force still pending).

10.2.3. Key Personnel

The provision regarding key personnel is, like the TRIM's provision of Art. 5 ECT, another clear example of an investment provision that relates to trade as well, in this case in particular to the supply of services through the presence of natural persons. In the RES sector, this is an important mode of services supply. At present, Art. 11(1) speaks of 'key technical services' that may be supplied by key personnel.

Currently, any decision concerning the admission of foreign key personnel is completely subjected to domestic law and there is merely a commitment to examine requests by foreign investors to admit such personnel in 'good faith'. Instead of subjecting any decision regarding the matter to domestic law, the ECT contracting parties could agree on binding commitments regarding this topic during the modernization process. This could reduce transaction costs and particularly contribute to the supply of technical services. In addition, it could constitute a means through which technology and skills could be transferred to host State nationals and thereby contribute to the building of capacity in the host State.[15]

10.2.4. Transparency

Enhanced transparency in the context of the RES sector can be a relatively easy manner to facilitate RES investments. IPA's could take the lead in disseminating information regarding investment opportunities in the RES sector, ideally in an international business language. Also, IPA's could serve as contact point for foreign investors. Enhanced transparency can thereby facilitate investments and reduce transaction costs.

10.2.5. Transfer of Technology

For a successful energy transition, the dissemination of RES technology is of great importance, in particular in countries that currently lack RES technology and the required skills to employ such technology. Therefore, transfer of technology is an important topic. Since FDI is often considered as a main driver of transfer of technology, a modernized ECT could play an important role in this regard. As Art. 8 ECT currently tries to achieve, transfer of technology always requires a balancing exercise between private interests on the one hand, and

15. Cees Verburg & Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology – The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' [2019] 2 Brill Open Law 1. P. 37.

public interests on the other hand. From an investors' perspective, a commercial basis for the transfer of knowledge and technology is preferred over forced transfer. In that regard, the business practice of the RES sector provides plenty of opportunities. For example, many of the services necessary for the construction, operation, and maintenance of RES projects are currently being rendered through the establishment of a commercial presence, whereby foreign investors most often draw from the local labor market, and the presence of natural persons, which allows for learning by doing.

At present, transfer of technology is not part of the modernization process.[16]

10.3. COMPREHENSIVE AGREEMENT ON RES INVESTMENT AND TRADE

Investment and trade in the RES sector are closely interrelated: both practically as well as legally. From the issues addressed above, investment protection is clearly something that falls within the ambit of IIA's, with regards to investment promotion, the linkages to trade are more evident. This also means that one has to transcend the traditional silos of international law regarding investment and trade if the purpose is to establish a legal framework that can effectively facilitate RES investments. Simply because trade related considerations have such an important effect on investment and vice versa. Therefore, such a comprehensive agreement should take into account not only investment protection and promotion, but also trade in RES goods and services.

If a future agreement fails to regulate trade and investment in the RES sector in a comprehensive manner, it will most likely affect its ability to effectively contribute to the dissemination and deployment of RES technology. Also, for a meaningful comprehensive agreement on RES investment and trade, it would be essential that important countries in the RES sector participate, such as China, and the US. In that regard, one should not expect miracles from the modernization process of the ECT. Quite to the contrary, not only are important countries in the RES sector currently no contracting party to the ECT but also since the list of topics

16. Energy Charter Secretariat, 'Approved Topics for the Modernisation of the Energy Charter Treaty' (29 November 2018) <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=3da319e52a78fa54058bc2c08eecc214> accessed on 06/06/2019.

approved for modernization evidences that the main focus will be on investment protection. This does not mean, however, that the required level of liberalization cannot be achieved in the context of FTA's outside the context of the ECT.

10.4. EPILOGUE

According to the IEA, ensuring that low carbon energy supply meets the worlds' energy demand in 2050 requires annual energy investments in the amount of USD 3.5 tln.[17] Since 2015, however, annual energy investments amounted to around USD 1.8 tln, well below what is required to meet the climate targets set by the Paris Agreement and meet the worlds' energy demand at the same time.

In addition to this, international economic relations have in recent years come under pressure from increased protectionism. Recent figures from UNCTAD demonstrate that global FDI, across all economic sectors, was down for the third consecutive year (-13 percent) in 2018, while in 2017 it was already down by 23 percent in comparison to 2016.[18] In 2017 investments in GVC's were also down, which may be indicative for future trade patterns.[19] Furthermore, the UNCTAD also noted 'a remarkable increase in investment restrictions or regulations.'[20] Since FDI can play an instrumental role in financing RES, in particular for countries that lack domestic financial resources to finance their energy transition, these numbers should be disconcerting.

To further complicate matters, the RES sector was already a sector where protectionist measures played an important role. Since the economic interests in the sector increase as the sector itself grows, regulating it in accordance with liberal economic rules might become increasingly complex. Even if a comprehensive agreement on RES trade and investment could be reached in the modernization process, the benefits of this agreement have to be accorded to all members of the WTO due to the MFN clause which might be a costly affair

17. International Energy Agency, *Perspectives for the Energy Transition – Investment Needs for a Low Carbon Energy System* (IEA/IRENA 2017). P. 8.
18. United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations 2018). Pp. XI–XII & 2. United Nations Conference on Trade and Development, *World Investment Report 2019* (United Nations 2019). Pp. X & 2.
19. United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations 2018). P. XII.
20. United Nations Conference on Trade and Development, 'Investment Policy Monitor' (Issue 19, March 2018). P. 1.

if major countries in RES goods and services are absent from the agreement.[21] This is in itself probably a major incentive not to reach an ambitious agreement within the ECT context.

All of this is unfortunate in light of the fact that liberalizing investment and trade in the RES sector might well enhance the competitiveness of RES – as expressed in a lower LCOE. This might accelerate the pace at which RES reach the tipping point of grid parity after which the energy transition might not only be regulatory driven anymore, but also market driven. If the economic laws of demand and supply indeed exist, the market is expected to favor RES over conventional ones from that moment onwards and we would be one step closer to a successful implementation of the energy transition.

21. Article XXIV, General Agreement on Tariffs and Trade (adopted 30/10/1947, entered into force 01/01/1948). Article V, General Agreement on Trade in Services (adopted 15/04/1994, entered into force 01/01/1995). Report of the Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products,* WT/DS34/R, 1999. Paras. 9.87-9.192. Report of the Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 1999. Paras. 42-63. William J. Davey, 'A Model Article XIV: Are There Realistic Possibilities to Improve it?' in Kyle W. Bagwell *et al* (eds.), *Preferential Trade Agreements – A Law and Economics Analysis* (Cambridge University Press 2011). James H. Mathis, 'The "Legalization" of GATT Article XIV – Can Foes Become Friends?' in Kyle W. Bagwell *et al* (eds.), *Preferential Trade Agreements – A Law and Economics Analysis* (Cambridge University Press 2011). Md. Rizwanul Islam & Shawkat Alam, 'Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence' [2009] 56(1) Netherlands International Law Review 1. Yong Shik Lee, 'Regional Trade Agreements in the WTO System: Potential Issues and Solutions' [2015] 8(2) Journal of East Asia and International Law 353.

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NEDERLANDSE SAMENVATTING

Het Moderniseren van het Energiehandvestverdrag – Het Faciliteren van Buitenlandse Investeringen in de Hernieuwbare Energiesector

Het multilaterale Energiehandvestverdrag (ECT) werd begin jaren '90 gesloten ten einde handel en investeringen in de energiesector te stimuleren in de relaties tussen West-Europese landen en de landen van het voormalige Oostblok. Om dit doel te bereiken werden regels afgesproken omtrent handel, investeringen en de doorvoer van energie. Dit proefschrift gaat in op de rol die het verdrag kan spelen in de huidige energietransitie, door te analyseren hoe het bij zou kunnen dragen aan het faciliteren van hernieuwbare energie investeringen. Het zwaartepunt ligt aldus op het investeringshoofdstuk van het verdrag, waar hernieuwbare energie investeerders in de praktijk met de nodige regelmaat gebruik van maken.

In het eerste hoofdstuk worden de onderzoeksvragen en de onderzoeksmethodologie geïntroduceerd. De hoofdvraag luidt: 'Welke wijzigingen moeten worden doorgevoerd in het juridische kader van het ECT, meer specifiek het hoofdstuk over investeringsbevordering en -bescherming, ten einde investeringen in hernieuwbare energiebronnen te faciliteren?' Het doel van dit proefschrift is om met aanbevelingen te komen die bijdragen aan een verandering van het geldende recht. Aldus is het doel van dit proefschrift niet om te analyseren waar het thans geldende recht in voorziet, het doel is om te analyseren waar het recht in zou moeten voorzien. Deze doelstelling sluit goed aan bij het recentelijk door de verdragsluitende partijen geïnitieerde moderniseringsproces van het ECT. Om tot een antwoord op de onderzoeksvraag te komen zal gebruik worden gemaakt van economische theorieën die ten grondslag liggen aan internationaal economisch recht. Om te analyseren waar het juridische kader van het ECT momenteel in voorziet wordt gebruik gemaakt van de regels omtrent verdragsinterpretatie zoals opgenomen in het Verdrag van Wenen inzake het Verdragenrecht. Deze regels worden in de praktijk veelvuldig toegepast in ECT-zaken. Daarnaast wordt tijdens de analyse van het juridisch kader van het ECT veelvuldig verwezen naar vergelijkbare bepalingen uit andere handels- en investeringsverdragen. De reden om een vergelijkend perspectief aan te nemen is gelegen in het feit dat de ECT verdragsluitende partijen hebben aangegeven dat ze in het moderniseringsproces willen aansluiten bij hedendaagse beleidstendensen.

Het tweede hoofdstuk bevat verschillende macro- en micro-economische theorieën die als achtergrond gebruikt zullen worden. Tevens worden de begrippen transactie- en kapitaalkosten geïntroduceerd. Uit deze theorieën blijkt dat handels- en investeringsliberalisering kan leiden tot meer efficiëntie waardoor de kosten van goederen en diensten die nodig zijn voor het opwekken van hernieuwbare energie gereduceerd kunnen worden. Tevens kan adequate investeringsbescherming de risico's omtrent investeringen mitigeren, waardoor de kapitaalkosten omlaag kunnen gaan.

In het derde hoofdstuk worden de elektriciteits- en hernieuwbare energiesector geïntroduceerd. De elektriciteitssector is tegenwoordig nog grotendeels op een traditionele manier georganiseerd, waarbij productie plaatsvindt aan de top en elektriciteit via transmissie- en distributiesystemen getransporteerd wordt naar de eindgebruiker. Dit model komt echter steeds meer onder druk te staan in de energietransitie, aangezien hernieuwbare elektriciteit steeds vaker decentraal wordt opgewekt. Bedrijven die actief zijn in de hernieuwbare energiesector zijn vaak internationaal georganiseerd, zo zijn er veel buitenlandse investeerders actief in de sector en zijn de aanvoerlijnen en waardeketens van toeleveranciers van de benodigde goederen en diensten vaak internationaal opgezet.

De hoofdstukken vier tot en met zeven beschrijven met name het huidige juridische kader van het ECT. Tevens wordt uitgelegd hoe dit kader relevant is voor hernieuwbare energie investeerders. Uit deze analyse blijkt dat de normen van het ECT vaak breed en dubbelzinnig zijn. Het verdrag is dan ook veelvuldig op een inconsistente manier geïnterpreteerd en toegepast. In vergelijking met hedendaagse investeringsverdragen valt verder op dat het ECT voorziet in een relatief hoog niveau van investeringsbescherming waardoor de drempel voor aansprakelijkheid van verdragsluitende partijen relatief laag ligt. Tot slot blijkt dat het huidige ECT vooral voorziet in investeringsbescherming en betrekkelijk weinig regelt omtrent investeringsbevordering.

Aan de hand van de in hoofdstuk twee geïntroduceerde economische achtergronden en de analyse van het ECT uit de hoofdstukken vier tot en met zeven worden in hoofdstuk acht de tekortkomingen van het huidige juridische kader opgesomd. In dit hoofdstuk wordt onderscheid gemaakt tussen maatregelen omtrent investeringsbevordering en -bescherming. In het kader van investeringsbevordering is er de nodige ruimte voor meer investeringsliberalisering en maatregelen die anderszins investeringen kunnen

bevorderen. Door middel van investeringsliberalisering, dat wil zeggen het scheppen van een gelijk speelveld tussen binnenlandse en buitenlandse investeerders, kan het ECT economische efficiëntie in de sector bevorderen waardoor de kosten van hernieuwbare elektriciteit kunnen dalen. Tevens hebben investeringsbevorderende maatregelen de potentie om transactiekosten te verlagen. Met betrekking tot investeringsbescherming is meer rechtszekerheid wenselijk: door de onvoorspelbaarheid in het huidige regime is het voor zowel Staten als investeerders soms lastig in te schatten of bepaalde maatregelen in overeenstemming zijn met het ECT of niet.

Hoofdstuk negen gaat in de op de verschillende manieren waarop de voorgestelde wijzigingen juridisch geïmplementeerd kunnen worden. Alsof het hervormen van een multilateraal verdrag in normale omstandigheden nog niet moeilijk genoeg is, stelt de huidige verdragstekst van het ECT de verdragsluitende partijen voor een grote uitdaging waardoor vergaande – en tijdrovende – hervormingsmaatregelen hoogstwaarschijnlijk noodzakelijk zijn. In dit hoofdstuk wordt een onderscheid gemaakt tussen maatregelen die formele stappen vereisen, zoals amendementen en/of additionele protocollen, aan de ene kant en minder vergaande maatregelen, die door middel van *soft law* maatregelen reeds effect kunnen sorteren, aan de andere kant. Het voordeel van deze laatstgenoemde categorie maatregelen is dat ze op een kortere termijn het gewenste effect kunnen hebben.

Het laatste hoofdstuk bevat de conclusie en aanbevelingen. Deze volgen logischerwijs op hetgeen in voorgaande hoofstukken is besproken. Het proefschrift eindigt op een kritische en sombere toon: de meest recente cijfers omtrent investeringen in de (hernieuwbare) energiesector wijzen uit dat er wereldwijd bij lange na niet genoeg geïnvesteerd wordt in de energiesector om in 2050 aan zowel de klimaatdoelstelling van het Parijs-akkoord te voldoen als ervoor te zorgen dat de wereldbevolking beschikt over een betrouwbare energievoorziening. Tevens lijkt economisch protectionisme de laatste jaren wereldwijd de kop op te steken waardoor het draagvlak voor maatregelen die moeten voorzien in de liberalisering van handel en investeringen afneemt.

ENGLISH SUMMARY

The multilateral Energy Charter Treaty was concluded in the early 1990's with the purpose of stimulating trade and investment in the energy sector between Western European countries and the countries of Eastern Europe and the former Soviet Union. To that end, rules were established regarding trade, investment, and the transit of energy. This dissertation examines the role that the treaty can play in the current energy transition, by analyzing how it can contribute to the facilitation of investments in the renewable energy sector. The main emphasis in this dissertation is on the investment chapter, which is in practice frequently invoked by renewable energy investors.

By reference to economic theories and the business practice in the renewable energy sector, this dissertation comes up with various recommendations that could be considered in the recently initiated modernization process of the treaty. Since the investment chapter is analyzed against the wider background of international economic law, the recommendations conform to contemporary policy tendencies, as preferred by the Energy Charter Conference during the modernization process.

Amongst the recommendations is that rules regarding investment protection are of great importance in the renewable energy sector, as practice already demonstrates, but that these should be accompanied by rules concerning investment promotion. Ideally, these rules would be concluded in the context of a broader agreement that also regulates trade, in both goods and services, since investment and trade in the renewable energy sector are closely interrelated.

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